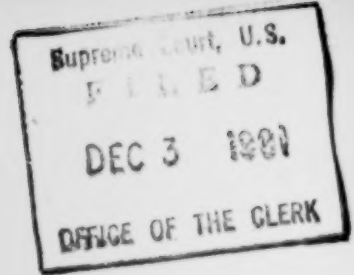


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Case No. A-362

SUPREME COURT OF THE UNITED STATES

October Term, 1990

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Philip E. Foster,

Petitioner

vs.

Rutgers, The State University,

et al.,

Respondents

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATE COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Philip E. Foster,

Petitioner Pro Se

23 East 81st Street

New York City, New York 10028

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## QUESTIONS PRESENTED FOR REVIEW

1. When is service of a summons and complaint " made " within the meaning of F.R.C.P. 4 (j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i)?
2. Is the Third Circuit's decision as to when service is " made " within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) correct in light of a decision by New Jersey's court of last resort?
3. When is service of a summons and complaint " made " within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(ii) ?

4. Is the Third Circuit's decision as to when service is "made" within the meaning of F.R.C.P. 4(j) correct in light of a decision of this Court?

5. Is a decision of the Second Circuit holding service is "made" within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint or are decisions of the Third, Fourth, and District of Columbia Circuits holding that service of a summons and complaint is not "made" within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint, where service is attempted under F.R.C.P. 4(c)(2)(C)(ii), correct?

6. Did the Third Circuit apply the correct standards in determining whether the pleadings alleged "good cause" within the meaning of F.R.C.P. 4(j)?

7. Did the Third Circuit apply the correct standards in determining whether "reasonable inquiry" within the meaning of F.R.C.P. 11 had been shown?



LIST OF ALL PARTIES

Petitioner: Philip E. Foster

Respondent: Rutgers, the State

University

The Rutgers Council of

American Association of

University Professors

The American Association of

University Professors

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## GROUNDS OF JURISDICTION

The date of entry of the Judgement Order sought to be reviewed is July 24, 1990.

A Petition for Rehearing of the Judgement Order was denied on August 21, 1990. By Order of Associate Justice David H. Souter, the time within which to file this Petition for Writ of Certiorari was extended to December 1, 1990.

The statutory provision believed to confer jurisdiction on the Court to review the Judgement Order is 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

F.R.C.P. 4(c)(2)(C)(i):

A summons and complaint may be served upon a defendant . . . pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of the State, or . . .

F.R.C.P. 4(c)(2)(c)(ii):

A summons and complaint may be served upon a defendant . . . by mailing a copy of the summons and complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service under this subdivision of this rule is received by

the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph . . .

F.R.C.P. 4(c)(2)(c)(A):

A summons and complaint shall, except as provided in subparagraph (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

F.R.C.P. 4(c)(2)(c)(B):

A summons and complaint shall, at the request of the party seeking service . . . be served by a United States Marshall or deputy United States marshal, or by a person specially appointed by the court for that purpose . . .

F.R.C.P. 4(j):

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion, . . .

#### F.R.C.P. 11

Every pleading, motion, and other paper of a party represented by attorney shall be signed by at least one attorney of record . . . signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleadings, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for

any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . .

N.J. Ct. R. 4:4-4(a)(1):

Personal Service. Upon an individual other than an infant under 14 years of age or an incompetent person, by delivering a copy of the summons and complaint to him personally . . . or by delivering a copy thereof to a person authorized by appointment or by law to receive service of process on his behalf.

N.J. Ct. R. 4:4-4(a)(2):

Optional Mailed Service. In lieu of personal service prescribed by subparagraph (1), service may be made



by registered, certified or ordinary mail, which shall be effective only if the party answers or otherwise appears in response thereto. If defendant does not appear within 60 days following mailed service, service shall be made as is otherwise required by this rule, and the time prescribed by R. 4:4-1 for issuance of the summons shall then begin to run anew . . . .

N.J. Ct. R. 4:4-1:

The plaintiff, his attorney or the clerk of the court may issue the summons. If a summons is not issued within 10 days after the filing of the complaint the action may be dismissed in accordance with R. 4:37-2(a).

Separate and additional summonses may issue against any defendants.

## STATEMENT OF THE CASE

Jurisdiction in the court of first instance is predicated upon 28 U.S.C.A. 1331 AND 1337 with regard to Petitioner's claim under federal labor law, 29 U.S.C.A. 152 and 182, and upon 29 U.S.C.A. 1332 by virtue of diversity of citizenship and his claim under the Civil Rights Act, 42 U.S.C.A. 1981 et seq.

Although appearing pro se in this case, Petitioner is a member of bar of the State of New York.

In June, 1986, Rutgers, The State University, breached its promises to the Petitioner and refused wrongfully to renew his three year teaching contract. The Rutgers Council filed a grievance with the University. The University attempted to frustrate the processing of this grievance, so the Council challenged the University's conduct before a hearing panel. In appearing before the panel, the Council acted with

gross negligence and wholly failed to fairly and properly represent Petitioner. The panel, which included a senior employee of the University, decided in favor of the university, and Petitioner's grievance was dismissed. An additional grievance was filed in July, 1987, which was again wrongfully rejected by the university.

As the six-month period allotted under federal labor law to challenge the panel's decision began to expire, Petitioner filed a complaint in the district court for New Jersey on August 24, 1988.

On or about August 25, 1988, Petitioner wrote to the Council and its counsel informing them that an action had been commenced against the University in which they were a defendant and asked if the Council would accept service by mail in lieu of personal service. A similar request was made to the University at the same time. Counsel for the Council replied they were not authorized to accept service, the counsel replied that service could be made only in

forms permitted by court rules, and the University responded by agreeing to accept service by mail.

Shortly after September 9, Petitioner called the District Court Clerk's Office, explained that he was a pro se plaintiff and asked what type of service of the summons and complaint was permitted. The clerk informed him that he could make service by certified mail, return receipt requested. Petitioner further asked how long he had within which to make such service, and he was told that he had 120 days from the filing of the complaint. Petitioner noted down this information.

Sometime after mid-September, Petitioner went to a law library to verify whether certified mail service could be made and to see to whom such service should be addressed. He went to the volume of the U.S.C.A. for the federal rules of civil procedure and there found F.R.C.P. 4, located thereunder section (c) which dealt with how "A summons and complaint may be served . . ." and then found under sub-section (c)(2)(c)(i) a provision which indicated that a summons and

complaint may be served " pursuant to the law of the State in which the district court is held . . .". Petitioner then looked up New Jersey law, and found under N.J.Ct.R. 4:4-4 that service was in fact permitted by certified mail. Petitioner noted down that which he had ascertained in the law library.

Petitioner next consulted with an attorney specialized in cases such as his about adding parties and when such additions would have to be made. Petitioner also inquired whether service could be made under

the provisions of state law and was told that this was a permissible way to proceed. About this time Petitioner again called the Clerk's Office and in response to his questions was informed that a new summons would have to be issued and done so within 120 days of the filing of a complaint if new parties were added. Again, Petitioner noted this information in written form.

As the 120-day deadline approached, Petitioner prepared to serve the summons and complaint by certified mail. On December 19, three days before the deadline, Petitioner again called the Clerk's Office, explained that he was a pro se plaintiff about to serve a summons and complaint by certified mail, return receipt requested and asked if he should also file an affirmation of service with the court. The clerk said that he should. Petitioner then asked if he should also send a form 18-A with the summons and complaint in addition to filling the affirmation of service. The clerk said that he should. Petitioner made notes of the clerk's responses. Petitioner also asked what should be done about the disparity of time for response on the

form 18-A and that in the summons issued to Respondent American Association of University Professors, a non-New Jersey defendant; Petitioner recalls that he was told not to worry about it.

Petitioner then proceeded to type up an affirmation of service prepare the form 18-A. Petitioner then took the materials to a copy shop and there noticed for the first time that the form 18-A stated that service was being made pursuant to F.R.C.P. 4(c)(2)(C)(ii). As he had no idea at that time of the significance of this statement, Petitioner decided not to sign or date the form 18-A.

Petitioner then put a copy of the summons and complaint, together with the unsigned and undated form 18-A in an envelope for each of the Respondents, took the envelopes to the post office clerk who affixed the proper postage to each envelope, cancelled the postage with a December 19, 1988 postmark, stamped " CERTIFIED MAIL Return Receipt Requested " on the front of each envelope, and affixed the certified mail return receipt form to the

back of each. The clerk then put the envelopes in the mail.

Petitioner then mailed an affirmation of service stating that " a copy of the Summons and a copy of the Complaint herein were duly served on each of the present defendants herein on Dec. 19, 1988 " and sent this affirmation, duly signed, to the clerk's Office, where it was filed on December 23, 1988.

On December 21, 1988, a day before the deadline, a duly authorized person accepted service for Rutgers, the State University and for the Rutgers Council by signing the certified mail return receipt form. It is unknown when the American Association received the summons and complaint. Rutgers, the State University signed and returned a copy of the form 18-A allegedly on December 23, 1988, one day after the deadline.

Prior to January 6, 1989, Rutgers, The State University reviewed Petitioner's affirmation on file with the District Court Clerk's Office.



On January 9, 1989, Rutgers, the State University moved to dismiss Petitioner's complaint alleging untimely service under F.R.C.P. 4(c)(2)(C)(ii) as did the Rutgers Council and the American Association on January 18.

On February 10, 1988, a second copy of the summons and complaint were personally served on the Rutgers, The State University and the Rutgers Council pursuant to state law because neither had appeared or answered and the period by which Petitioner must make personal service under state law such circumstances was about to run.

On February 11, 1988, Petitioner cross-moved, inter alia, for sanctions under F.R.C.P. 11 for failure to make "reasonable inquiry " before the filing of Respondents motions.

On May 3, 1989, the District Court entered an Order granting Respondents' motions and denying Petitioner's cross-motions and filed an opinion setting out the reasons for its conclusions.

On January 16, 1990, the District Court filed a memorandum opinion concerning motions and cross-motions of the panel. which is not a respondent in this matter.

On July 24, 1990, the Third Circuit affirmed the judgement of the District Court without opinion.

It should be noted that on June 5, 1989, Petitioner filed a notice of appeal from the District Court's May 3, 1989 Order while waiting for his motions to alter or amend under F.R.C.P. 59(e) in order to preserve his right of appeal from the May 3 order. The District Court refused to decide the motions until the Third Circuit had decided an appeal purportedly taken on June 5 even though the District Court had the power to decide the motions. Venen v. Sweet, 758 F2d 117, 122 (3rd Cir. 1985). Only after the Third Circuit dismissed the purported appeal on October 30, 1989 did the District Court turn to Petitioner's motions, deciding them only on January 16, 1990, thereby considerably delaying proper consideration of his appeal by the Third Circuit. As a

consequence of these delays, not only has Petitioner arguably lost his federal labor law claim, which is governed by a six-month statute of limitations, Del Costello v. Teamsters, 462 U. S. 151 (1983), but also his diversity claims, Butler v. Sinn, 423 F2d 1116 (3rd Cir. 1970); Walsh v. Boss Linco Lines, 537 F. Supp. (D. N.J. 1981). On June 25, 1990, Petitioner filed a new complaint against respondents, but the claims in this complaint have all been dismissed by the District Court, except for that of wrongful interference against the Council, which is controlled by a six-year Statute of Limitations, holding that the other claims against Rutgers and against the Council are all without the statute of limitations.

## ARGUMENT

In West v. Conrail, 481 U.S. 35, 39, n. 5 (1987), this Court was presented with, but determined that it then did not have to decide the question of when service is "made" under F.R.C.P. 4(j) ("Our holding that the statute of limitations was tolled when the complaint was filed eliminates the potential difficulty of determining the actual dates on which service of the complaint was made on the various defendants"). As discussed, and for the reasons given herein below, a grant of the writ sought in this petition would enable this Court to address this important procedural question.

1. When is service of a summons and complaint "made" within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i)?

The District Court found that Petitioner " followed the proper procedure for mailing service " when he followed the directions of N.J.Ct.R. 4:4-4(a)(2) which directs that " service may be made by . . . certified . . . mail, which shall be effective only if the party served answers or otherwise appears in response thereto. If the defendant does not appear within 60 days following mailed service, service shall be made as is otherwise required by this rule, and the time prescribed by R. 4:4-1 for issuance of the summons shall then begin to run anew ". The District Court noted that " while Fed. R. Civ. P. 4(c)(2)(C)(i) permits the election of the state method for making service, it does not provide that the plaintiff will then be governed by all of the state rules for perfecting service ". The District Court then concluded, without elaboration: "Plaintiff is therefore still subject to Fed. R. Civ. P. 4(j), and did not meet that rule's provision for timely service." In so doing, the District Court assumed that the 120-day period of F.R.C.P. 4(j)

applies when service is attempted under F.R.C.P.

4(c)(2)(C)(i).

The legislative history of F.R.C.P. 4 indicates that F.R.C.P. 4(j) was not intended to apply where service is attempted by someone authorized to make service by state law. Prior to 1982, F.R.C.P. 4 provided on the one hand that " Service of process shall be made by a United States Marshal " and on the other that " service of process may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made ". Moore's Fed. Prac., Rule 4, §4.01(33.-2), at 43. In 1982, this Court proposed to change the provision regarding marshall service to authorized service of a summons and complaint by anyone not a party and not less than 18 years of age and limit service by marshals to where a request for such service was made. Id. The Advisory Committee indicated that the purpose of this change " is to relieve the burden on the United States Marshal

Service of serving civil process in private litigation". Id., at 45. The Judicial Conference indicated that " the proposed amendments are designed to relieve the United States Marshals of the duty of serving summonses and complaints in most civil actions ". Amendments to the Federal Rules of Civil Procedure, House Doc. 97-173, 97th Cong., 2nd Sess., April 29, 1982, Ap. A, at 5. The Department of Justice informed the House Judiciary Committee that such change was to " relieve effectively the United States Marshall Service of the duty of routinely serving summons and complaints . . . and would thus achieve a goal this Department has long sought ". 28 U.S.C.A. F.R.C.P 4, Pkt. Supp. 1989, 24. Congressman Edwards, who introduced the bill which enacted the change into law, also indicated the purpose of this change was "to alleviate the burden on the Marshal's Service ". Moore's Fed. Prac., Rule 4, §4.01(33.-2), at 49.

Edwards further stated, when seeking a delay on the adoption of F.R.C.P. 4, that "Rule 4 does not currently provide a time limit on the service of process, largely

because United States marshalls are performing the service. With the changes . . . reducing the role of marshals, a new subsection (j) was added, requiring that service be made within 120 days of the filing of the complaint ". House Rep. 97-662, 97th Cong., 2nd Sess., July 23, 1982, 3. Thus, when adopting the 120-day period, Congress intended such provision to apply where the service made was that which previously would have had to have been made by a United States marshal, and not where such service could have been made by a person authorized to make service under state law. Since service was attempted in the instant case pursuant to F.R.C.P. 4(c)(2)(C)(i) which authorizes service " pursuant to the law of the State in which the district court is held" and such service was made by a person who would not have had to have service made by a United States marshal but rather a person authorized to serve process in the courts of the state in which the district court is held, the District Court erred in applying the 120-day period to the service attempted in this case. This Court has never



ruled on whether F.R.C.P. 4(j) applies when service is attempted under F.R.C.P. 4(c)(2)(C)(i) by a person authorized to make such service by state law.

Assuming, arguendo, that F.R.C.P. 4(j)'s 120-day period applies to service attempted under F.R.C.P. 4(c)(2)(C)(i) where service is made by someone authorized to make such service under state law, the District Court also erred as a matter of law in concluding that the service attempted was not "made" within the meaning of F.R.C.P. 4(j) within the 120-day limit. The District Court found that "Plaintiff filed his complaint . . . on August 24, 1988" and that "On December 19, 1988, plaintiff mailed process to defendants by certified mail . . .", that is, three days before the 120-day period had ended. Nevertheless, the District Court concluded that such service did not meet the 120-day requirement. The District Court's conclusion must have assumed that when service is attempted under F.R.C.P. 4(c)(2)(C)(i) it is not "made" within the meaning of F.R.C.P. 4(j) when the summons and

complaint are mailed. The District Court also did not specify whether the determination of when service is "made" within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) is a matter of federal or of state law.

If the determination of when service is "made" within the meaning of 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) is a matter of federal law (see the comment by a member of the Supreme Court Advisory Committee suggesting that consideration of the effect of failure to promptly effect service be deferred to consideration of whether an action should be dismissed when formulating the original of F.R.C.P. 4 in 1938), then it appears that a federal question claim such as that raised here under 29 U.S.C.A. 152 and 182 would be governed by federal law whereas a diversity claim such as that raised here under 28 U.S.C.A. 1332 and 42 U.S.C.A. 1981 et seq. would be governed by state law since F.R.C.P. 4(j) does not address the question of when service is "made", New Jersey's service requirements are an integral part of its statute

of limitations, and failure to apply New Jersey's service requirements would, if federal precedents were not applied, result in discrimination against a non-citizen plaintiff, see Walker v. Armco, 446 U.S. 740 (1980) and the cases decided thereunder. Alternatively, the determination of when service is "made" when service is attempted under F.R.C.P. 4(c) (2)(C)(i) may be a matter solely of state law. See the comments of members of the original Supreme Court Advisory Committee on the predecessor to F.R.C.P.

4(c)(2)(C)(i) in Proceedings of the Institute at Washington, D.C., 1938, 113, 239 and Proceedings of the Institute on Federal Rules, Rules of Civil Procedure for the District Courts of the United States, 1938, 205, 212. This Court has never addressed these threshold questions.

The legislative history of F.R.C.P. 4(j) indicates that Congress intended to address the question of when service was "made" within the meaning of F.R.C.P. 4(j). Congressman Edwards, in seeking to delay adoption of the original bill, stated: "The

Committee has received complaints about ambiguities in new subsection (j) . . . The Committee on Federal Courts of the New York State Bar Association . . . also points out that the proposed amendment is ambiguous in dealing with the situation where service is timely but defective through no fault of the party. New subsection (j) requires dismissal of the action if service was not "made" within 120 days. Whether service in this instance was "made" within 120 days. Whether service in this instance was "made" within the meaning of subsection (j) is not clear from the text of the subsection or the advisory notes to the subsection ". House Rep. 97-662, 97th Cong., 2nd Sess., July 23, 1982, 3-4. The "ambiguities" were never clarified, as numerous cases, including the instant case, testify. This Court, however, has never passed on the question of when service is "made" within the meaning of F.R.C.P. 4(j). For reasons mentioned in 2 and 4 below, Petitioner maintains that service is "made" within the meaning of F.R.C.P. 4(j) when attempted under F.R.C.P. 4(c)(2)(C)(i) when the summons and

complaint are mailed. As the District Court found that the summons and complaint in this case were mailed within the 120-day period, but nevertheless held such service untimely, the District Court erred as a matter of law on this issue.

In addition, assuming, arguendo, that service is "made" within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i) not upon the mailing of the summons and complaint, but rather upon the receipt thereof, the District Court further erred as a matter of law in holding such service as made under F.R.C.P. 4(c)(2)(C)(i) untimely as to respondent Rutgers, the State University. The District Court noted that "On December 23, 1988, Rutgers returned Form 18-A ", but it made no finding as to when Rutgers had received the summons and complaint. Petitioner submitted a certified mail return receipt form signed by an authorized agent for Rutgers on December 21, 1988, A-54. Rutgers submitted an affidavit stating only that on December 23, 1988, it signed form 18-A " which had been enclosed with the

summons and complaint ", A-59; it offered no evidence on the date on which it had received the summons and complaint. If, therefore, the service attempted upon Rutgers pursuant to F.R.C.P. 4(c)(2)(C)(i) is " made " within the meaning of F.R.C.P. 4(j) not when mailed, but when received, whether such service was timely would either depend upon which party has the burden of proof, a question on which this Court has not spoken, or else must be said to have to be decided in favor of the Petitioner. The Third Circuit has held that the burden of proving that service is untimely rests upon the moving party, here the Respondents. See Rosen v. Solomon, 374 F. Supp. 915 (E.D.Pa. 1974), aff'd. 423 F2d 1051 (3rd Cir. 1975).

Since most civil litigation in the Federal courts is commenced by the service of a summons and complaint, and many suits are no doubt commenced by service of a summons and complaint pursuant to F.R.C.P. 4(c)(2)(C)(i), consideration by this Court of what law governs the determination of when such service is " made " within the meaning of F.R.C.P. 4(j),

of when such service is "made", whether or not F.R.C.P. 4(j) applies when such service is made by someone authorized to make such service under state law, and who should bear the burden of proving untimeliness of service are important questions of Federal law which, except for the issue of burden of proof, have been decided by the Third Circuit in the instant case, but which should be settled by this Court. See Schlagenhauf v. Holder, 379 U.S. 104 (1964) (certiorari granted "to review undecided questions concerning the validity and construction of Rule 35 " of the Federal Rules of Civil Procedure, id. at 109); Societe Int'l. v. Rogers, 357 U.S. 197 (1957) (certiorari granted because decision below "raised important questions as to the proper application of the Federal Rules of Civil Procedures ").

2. Is the Third Circuit's decision as to when service is "made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(i) correct in light of a decision by New Jersey's court of last resort?

As noted above, the determination of when service is " made " within the meaning of F.R.C.P. 4 (j) when service is attempted under F.R.C.P. 4(c)(2)(C)(i) may be a question of state law. If the determination is a matter of state law, then the District Court erred as a matter of law in failing to follow the authority of New Jersey's court of last resort.

Prior to the present rule in New Jersey which permits service by mail, N.J.Ct.R. 4: 4-4(a)(2), service was made by delivery of the summons to the defendant by a sheriff. The question occasionally arose whether such service was complete for statute of limitations purposes when issued to the sheriff or when actually delivered by the sheriff to the defendant. In County v. Pacific Coast Borax Co., 67 N.J.L. 48, 50 A. 906 (Sup.



Ct. 1902), aff'd 68 N.J.L. 273, 53 A. 386 (Ct. E. & A. 1902), the summons was given to the sheriff within the statute of limitations, but was not delivered by him until after the statute had run. New Jersey's court of last resort held that delivery of the summons to the sheriff, not delivery of the summons by the sheriff to the defendant, determined when service was made for purposes of the statute of limitations. Since service by the sheriff has been replaced under New Jersey law with service by mail, service by mail should be deemed complete upon mailing of the summons and complaint by the defendant. In a more recent decision, New Jersey's highest court dismissed a complaint because two years had elapsed between teste and delivery of the summons and complaint to the sheriff for service upon the defendant. Court Inv. Co. v. Perillo, 48 N.J. 334, 225 A.2d 352 ( N.J. 1966). Had the District Court adhered to the authority in County v. Pacific Coast Borax Co., it would not have held service in the instant case to have been untimely under F.R.C.P. 4(j).

Since the Third Circuit has decided a federal question in a way in conflict with a state court of last resort, this Court ought to grant this petition for a writ of certiorari. See Minnick v. Gardner, 292 U.S. 48 (1933) ( reversal of Third Circuit affirmance of order denying preference to a lien on a fund resulting from sale of goods by debtor's trustee in bankruptcy for failure to follow Pennsylvania decision law ).

3. When is service of a summons and complaint " made " within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(ii)?

F.R.C.P. 4(c)(2)(C)(ii) differs significantly from F.R.C.P. 4(c)(2)(C)(i). F.R.C.P. 4(c)(2)(C)(ii) specifies that after mailing a copy of the summons and complaint, together with two copies of a notice and acknowledgement conforming substantially to form 18-A, if " no acknowledgement of service . . . is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made "

by personal service or by other authorized means.

Although the District Court noted correctly that " Fed. R. Civ. P. 4(j) provides that service of process must be made within 120 days following filing the summons and complaint " it concluded on the basis of prior Third Circuit decisions that " in this circuit, the individual making the complaint must mail service and receive the form from defendant within 120 days of filing the complaint " ( emphasis in original ). As there is no basis for this judicial gloss on F.R.C.P. 4(j), the District Court erred as a matter of law in determining that service is not " made " within the meaning of F.R.C.P. 4(j) until the plaintiff has received a form of acknowledgement from the defendant. It should be noted at the outset that Petitioner has never claimed that he attempted service under F.R.C.P. 4(c)(2)(C)(ii). Rather, Respondents claimed that Petitioner had attempted service under F.R.C.P. 4(c)(2)(C)(ii) and then argued that such service was untimely under F.R.C.P. 4(j). It was solely on the basis of Respondents' claim that the District Court found

service attempted under F.R.C.P. 4(c)(2)(C)(ii) to be untimely under F.R.C.P. 4(j).

Assuming, arguendo, that Petitioner attempted service under F.R.C.P. 4(c)(2)(C)(ii), such service was nevertheless timely. In 1982, this Court proposed a new provision which would authorized service " by registered or certified mail, return receipt requested and delivery restricted to the addressee ". Moore's Fed. Prac., Rule 4, " 4.01(33.-2), at 44. This Court also proposed that if service was to be made pursuant to this new provision, that " service shall be deemed to have been made . . . as of the date on which the process was accepted, refused or returned as unclaimed ". Id. Congress, however, decided to eliminate this Court's proposed provision, and to replace it with one which, in the words of Congressman Edwards, "provides for a system of service by mail similar to the system now used in California. See Cal. Civ. Pro. § 415.30 (West 1973). Service would be by ordinary mail with a notice and acknowledgement of receipt form enclosed ". Id. Although Congress modeled F.R.C.P.. 4(c)(2)(C)(ii)

on California Code §415.30, it chose not to follow the Code's provision that " Service of summons pursuant to this section is deemed complete on the date a written acknowledgement of receipt of summons is executed, if such acknowledgement thereafter is returned to sender ". Id. § 415.30(c). Since Congress rejected this Court's proposal that service made when the process was accepted, refused or returned unclaimed, and did not adopt California's provision which would deem service made upon execution of the acknowledgement, it would appear that Congress intended service to be " made " within the meaning of F.R.C.P. 4(j) when service is attempted under F.R.C.P. 4(c)(2)(C)(ii) upon the mailing of the summons and complaint. As noted in 5 below, this is the conclusion reached by the Second Circuit.

The instant case also raises a number of matters auxiliary to when service is " made " within the meaning of F.R.C.P. 4(j) where attempted under F.R.C.P. 4(c)(2)(C)(ii). Petitioner argued below that service was " made " within the meaning of F.R.C.P.

4(j) upon Respondent Rutgers, the State University and the Rutgers Council by virtue of their actual knowledge of the suit against them as a result of letters between Petitioner and Rutgers, The State University, A-44, 45, and extensive contact and letters between the Petitioner and Rutgers Council, e.g., A-27-29, 4748, all within 120 days of the filing of the complaint.

Petitioner also argued below that if service is not "made" within the meaning of 4(j) until such service is acknowledged, that the service attempted was timely by virtue of the certified mail return receipts signed by agents of the Respondents Rutgers, the State University and The Rutgers Council on December 21, 1988, A- 54, 55. Petitioner further argued below that Respondents Rutgers is estopped from asserting a claim of untimeliness because it had waived its right to personal service under F.R.C.P. 4(A) where the sender does not receive an acknowledgement within 20 days of mailing the summons and complaint by virtue of its agreement to accept service by mail, A-45. Lastly, Petitioner argued below that service attempted under

F.R.C.P. 4(c)(2)(C)(ii) is timely if timely under F.R.C.P. 4(c)(2)(C)(i). The court below refuses to address any of these arguments.

Since most civil litigation in the Federal courts is commenced by the service of a summons and complaint, and most are no doubt commenced by service of a summons and complaint pursuant to F.R.C.P. 4(c)(2)(C)(ii), consideration by this Court of when such service is "made" within the meaning of F.R.C.P. 4(j) and perhaps the other, related questions raised by Petitioner below, are important questions of federal law which have been decided by the Third Circuit in the instant case, but which should be settled by this Court. See Schlagenhauf v. Holder, 370 U.S. 10 (1964); Societe Int'l. v. Rogers, (1957), discussed supra. To date, this Court has never addressed the question of when service is "made" within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(ii). Until this question is answered, doubt will remain as to when service must be "made", or whether service has been "made", for

such service to be timely under F.R.C.P. 4(j).

Decisions of the Courts of Appeals on this question are considered in 5 below.

4. Is the Third Circuit's decision as to when service is "made" within the meaning of F.R.C.P. 4(j) correct in light of a decision of this Court.

Prior to the 1982 enactments authorizing service by mail under Federal law, service of a summons and complaint had to be made by a United States marshal. The situation occasionally arose where the delivery to the marshal was within the statute of limitations, but delivery to the defendant was without the statute, see, e.g. Maier v. Independent Taxi Owners Ass'n., 96 F.2d 579 (Ct.App. D.C 1938) (refusal to dismiss where declaration delivered to marshall on the last day the action could begin under the statute of limitations), Equitable Assurance Co. v. Schwartz, 42 F2d 646 (5th Cir. 1930) (refusal to dismiss where " the bill was filed



and the process issued within the contestable period "), and U.S. v. Northern Finance Corp., 16 F.2d 999 (2nd Cir. 1927) ( Judge Hand stating that " it is the usual rule that the issuance of the subpoena, after bill filed, and the lodgement of it for service in the sheriff's hands, tolls the statute " id., at 999). Such a case presented itself before this Court in Linn & Lane Timber Co. v. U.S., 236 U.S. 574 (1915). Justice Holmes, writing for this Court, stated that a suit should not be dismissed for being without the statute of limitations where " the bills were filed and subpoenas were taken out and delivered to the marshal for service " before the statute had run. Id., at 578. If the District Court had followed the Court's decision in Linn & Lane Timber Co. it should not have dismissed Petitioner's complaint for failure to comply with the requirements of F.R.C.P. 4(j) where service was deemed attempted under F.R.C.P. 4(c)(2)(C)(ii) or, for that matter, where service was made under F.R.C.P. 4(c)(2)(C)(i) if when such service was " made " is a matter of Federal law ( see 1 above ). The Third

circuit's affirmance of the District Court's decision has decided a federal question in a way that conflicts with an applicable decision of this Court. Under such circumstances, certiorari may be granted. See U.S. v. Rands, 389 U.S. 121 ( 1967 ) ( certiorari granted " because of a seeming conflict between the decision below and " a prior decision of this Court, id. at 122).

5. Is a decision of the Second Circuit holding service is " made " within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint or are decisions

of the Third, Fourth, and District of Columbia Circuits holding that service of a summons and complaint is not "made " within the meaning of F.R.C.P. 4(j) upon the mailing of a summons and complaint, where service is attempted under F.R.C.P. 4(c)(2)(C)(ii), correct?

Since Congress did not specify when service is "made " within the meaning of F.R.C.P. 4(j) and most civil litigation in the Federal courts is commenced by service of a summons and complaint under F.R.C.P. 4(c)(2)(C)(ii), numerous cases have arisen where the Federal courts have had to determine when service is "made " within the meaning of F.R.C.P. 4(j). In the majority of such cases, the question presented to the courts was whether or not service was "made " when the summons and complaint were mailed, or whether service was not "made " until the acknowledgement had been returned to and received by the sender.

The Second Circuit, in Morse v. Elmira Country Club, 752 F2d 35, 39 ( 2nd Cir. 1984 ) concluded

largely on the basis of Congress's " intentional " omission of a provision similar to California Code § 415.30(c), that service was " made " when the summons and complaint were mailed; return of the acknowledgement to the sender was not determinative of when service was " made " but rather served only as evidence that service had been made. The Third Circuit, in the instant case, Foster v. Rutgers, The State University et al., 909 F2d 1476 ( 3rd Cir. 1990 ) and in a prior case, relied on by the District Court below, Green v. Humphrey Elevator and Truck Co., 816 F2d 877 (3rd Cir. 1987), the Fourth Circuit in Armco v. Penrodstatler Bld. System, Inc., 733 F2d 1087 (4th Cir. 1984), and the District of Columbia Circuit in Combs v. Nick Garrison Trucking, 825 F2d 437 ( D.C.Cir. 1987 ) ( discussing the split in the Circuits ), have held that service is not " made " within the meaning of F.R.C.P. 4(j) until the sender has received the executed and returned copy of the acknowledgement. The position of these Circuits rests principally on a comment by Congressman Edwards,

made when explaining the mechanics of F.R.C.P. 4(c)(2)(C)(ii), and not when addressing service under F.R.C.P. 4(j), that " If the defendant returns the acknowledgement form to the sender within 20 days of mailing, the sender files the return and service is complete ", Moor's Fed. Prac., Rule 4, PAR. 4.0L(33.-2), at 44. The principal difficulty with the position of the Third, Fourth, and District of Columbia Circuits is that the timeliness of service under their view is taken out of the hands of the plaintiff and put in those of the defendant. For reasons such as this, the New York Bar Association has recommended that the Second Circuit's view be enacted into law by statute. 116 F.R.D. 179.

A serious consequence of the Third, Fourth and District of Columbia Circuits is worth noting. Although the plaintiff may mail the summons and complaint within the statute of limitations, if the defendant defeats such service by failing to return the acknowledgement within 120-days, the plaintiff may be time-barred from bringing his claims again. This

appears to have happened in the instant case, and has happened in prior cases. For this reason, service under F.R.C.P. 4(c)(2)(C)(ii) has become in some Circuits, as one commentator put it, "a trap for the unwary".

Since the decision by the Third Circuit in the instant case conflicts with the decision of the Second Circuit in Morse v. Elmira Country Club on the important matter of when service is "made" within the meaning of F.R.C.P. 4(j) where service is attempted under F.R.C.P. 4(c)(2)(C)(ii), this petition for a writ of certiorari should be granted. See U.S. v. Schaeffer Brewing Co., 356 U.S. 227, 230 (1957) ( certiorari granted where question presented was when the time commenced within which an appeal must be "taken" within the meaning of F.R.C.P. 73(a) because of conflict between Circuits and public importance of the proper interpretation and uniform application of the provisions of the Federal Rules ). See also Nat'l. Ass'n. of Greeting Card Publishers v. UPS, 412 U.S. 810, 820 (1983) ( certiorari granted " because of

inconsistencies in the holdings " in two Circuits construing provisions of the Postal Reorganization Act ).

6. Did the Third Circuit apply the correct standards in determining whether the pleadings alleged " good cause " within the meaning of F.R.C.P. 4(j)?

The District Court did not apply the correct standards in determining whether " good cause " had been shown within the meaning of F.R.C.P. 4(j) in two ways: (1) it did not apply the correct standard in reading the allegations of the pleadings; and (2) it did not apply the correct standard in determining whether the the allegations as read constitute " good cause " within the meaning of F.R.C.P. 4(j)

Petitioner alleged, inter alia, that he was told by the Clerk's Office shortly after filing the complaint that he " had 120 days from the filing of the complaint" in which to make service, and he noted this down at the

time, and that he had been told that he could make such service by certified mail. Petitioner alleged that he then went to a law library where he found F.R.C.P. 4(c)(2)(C)(i) which authorized service pursuant to state law, and then found N.J.Ct.R. 4:4-4 which provided that in fact service could be made by certified mail, and noted such information down. Petitioner alleged that he then consulted with an attorney specialized in the substantive matters which this case raises, asked him also about procedural matters, and noted down his comments. Petitioner alleged that he again telephoned the Clerk's Office and was informed that were he to add new parties that service would have to be made " within 120 days of the filing of the complaint " and noted down such information on the sheet that he had taken to the library. Petitioner further alleged that on the day of intended mailing, three days before the 120-day deadline, he again called the Clerk's Office and was told that he should include a copy of form 18-a even though service was to be made by certified mail, return receipt, and noted down



such information. The foregoing allegations are each material to whether or not Petitioner had alleged "good cause", but the District Court found only that Petitioner "does state several times in his papers that he researched the federal law regarding service of process". The District Court ignored the allegations that Petitioner had been told by the Clerk's Office simply that he had 120 days within which to make service, that he researched state law and intended to make service under F.R.C.P. 4(c)(2)(C)(i), that he included a copy of form 18-A in his mailing solely on the advice of the clerk's Office, that he had consulted with an attorney on procedural matters, and overlooked the fact that F.R.C.P. on its face simply requires that service be "made" within 120 days. The District Court can not be said to have read Petitioner's allegations most favorably to the non-moving party as indeed it ought to have done under the Third Circuit's own rules, see, e.g., Sturm v. Clark, 835 F2d 1009 (3rd Cir. 1987); D.P. Enterprises v. Bucks Cty., 752 F2d 943 (3rd Cir. 1984). It would appear that most Circuits are

in agreement that in motions to dismiss, the pleadings are to be read in a light most favorable to the non-moving party, but this Court has never addressed this important question.

The District Court held that Petitioner had not shown "good cause" within the meaning of F.R.C.P. 4(j) because Petitioner had not exercised "diligence" in making service, that Petitioner had not been "thorough". In the absence of crediting properly Petitioner's allegations, the District Court could easily conclude that Petitioner had not been "thorough" but there is no basis in using "diligence" as the standard by which "good cause" is to be measured.

When enacting F.R.C.P. 4(j) Congress was particularly concerned that a plaintiff not be prejudiced for failure to comply with the 120-day deadline. When enacting the provision, Congress noted that "Where plaintiff has made a reasonable effort to serve defendant, Congress intended that the 120-day deadline be extended". 1982 U.S. Code Cong. & Ad. News, 4434, 4442. In applying a "diligence"

and thoroughness " test, the District Court contravened Congressional intent, and added a burden to the Petitioner's shoulders which Congress had not intended.

In affirming the District Court's decision, the Third Circuit has applied a standard to the reading of allegations which is entirely unfair to the non-moving party to a motion to dismiss and adopted an interpretation of " good cause " contrary to that intended by Congress. In so doing, it has decided important questions of Federal law which have not been, but which should be settled by this Court. For this reason, this petition should be granted. See, e.g. Schlagenhauf v. Holder, 379 U.S. 104 (1964), discussed supra.

7. Did the Third Circuit apply the correct standards in determining whether " reasonable inquiry " within the meaning of F.R.C.P. 11 had been shown?

F.R.C.P. 11 provides for mandatory sanctions if a brief or paper is signed without "reasonable inquiry" that it is well grounded in fact and warranted by law. After receiving a letter indicating that Petitioner was requesting permission to make service by mail, Respondents received an envelope, clearly marked certified mail, inside of which was to be found a complaint indicating that Petitioner was proceeding pro se and a summons, also stating that Petitioner was proceeding pro se, and indicating what the respondent must do, when it must be done, and what would happen if it was not done. In addition, there was also an unsigned and undated form 18-A. Shortly thereafter, Rutgers, The State University, examined that District Court file, and found there an Affirmation of Service, signed by Petitioner, and stating that only a summons and complaint had been mailed to the respondents on December 19, 1990; the Affirmation also indicated that Petitioner was proceeding without counsel. Rutgers, The State

University then communicated this knowledge to counsel for the other Respondents and to its own counsel. Service by certified mail is authorized only under F.R.C.P. 4(c)(2)(C)(i) and is not authorized under F.R.C.P. 4(c)(2)(C)(ii). The form 18-A was neither signed nor dated, as required by F.R.C.P. 4(c)(2)(C)(ii), nor did the envelope contain, as further required by F.R.C.P. 4(c)(2)(C)(ii), a second copy of form 18-A nor a return prepaid envelope addressed to the sender. Petitioner did not return the copy of form 18-A which it received from Rutgers, The State University as he ought to have done if he was proceeding under F.R.C.P. 4(c)(2)(C)(ii).

Despite the foregoing, Respondents made no inquiry as to whether service had been made under F.R.C.P. 4(c)(2)(C)(i), but rather moved for dismissal under F.R.C.P. 4(j) alleging solely that service had been made under F.R.C.P. 4(c)(2)(C)(ii) and that service was therefore untimely.

Subsequent to receiving Respondent's motion papers, but prior to the return date of their motions,

Petitioner served Rutgers, The State University and The Rutgers Council personally, as required under F.R.C.P. 4(c)(2)(C)(i) and N.J.Ct.R 4:4-4 where the defendant does not answer or otherwise appear. None of the Respondents mention receipt of personal service in their papers submitted to the District Court prior to the return date although such service was effected three weeks before such date.

The District court dismissed Petitioner's complaint principally on the ground that he had not complied with the requirements of F.R.C.P. 4(c)(2)(C)(ii) and only considered service under F.R.C.P. 4(c)(2)(C)(i) because Petitioner had not signed the form 18-A.

The circumstances here, prior to the Respondents' motions, were such that Respondents should have asked Petitioner if he had intended service under F.R.C.P. 4(c)(2)(C)(ii). As a leading commentator has stated, "If state law . . . also authorizes mail service . . . a defendant may become confused about his responsive steps . . . The

counselling point to the defendant's lawyer is to check the point out with the Plaintiff's attorney. It shouldn't be a hard one to work out, unless the defendant is deliberately trying to maneuver the plaintiff out of time . . . 1985 Practice Commentary to Rule 4, Pkt. Sup. to 28 U.S.C.A. Federal Rules of Civil Procedure Rules 1-11 Par. C4-20, at 101-102. If Respondents are successful in the instant case, they will indeed have maneuvered the plaintiff in this case out of time.

The District Court denied Petitioner's cross-motion for sanctions under F.R.C.P. 11 by looking to the conduct of the Petitioner rather than that of the Respondents. The District Court denied Petitioner's cross-motion on the grounds that " plaintiff cannot assert his own deficiency regarding method of service " in making a claim under F.R.C.P. 11. The District Court should have evaluated Respondent's actions not those of the Petitioner to determine if Respondents had made " reasonable inquiry ". In affirming the District Court's decision, the Third Circuit has applied an incorrect standard in

determining whether sanctions should be levied under F.R.C.P. 11. The proper standard for sanctions under F.R.C.P. 11 is an important question of federal law which has not been, but which should be, settled by this Court.

For the foregoing reasons, Petitioner requests that a writ of certiorari to the Third Circuit be granted.



APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 90-5117

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PHILIP E. FOSTER

Appellant

v.

RUTGERS, THE STATE UNIVERSITY; THE  
RUTGERS COUNCIL OF AMERICAN  
ASSOCIATION OF UNIVERSITY  
PROFESSORS; THE PERMANENT PANEL  
ON PROCEDURES; and THE AMERICAN  
ASSOCIATION OF UNIVERSITY  
PROFESSORS, Joint and Several

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Appeal from the United States District Court  
for the District of New Jersey  
(D.C. Civil No. 88-03692)

District Judge: Honorable H. Lee Sarokin

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Submitted Under Third Circuit Rule 12(6)

July 2, 1990

Before: MANSMANN, COWEN AND WEIS, Circuit  
Judges.

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JUDGEMENT ORDER

After consideration of all contentions raised by  
appellant, it is

ADJUDGED AND ORDERED that the  
judgement of the district court be and is hereby  
affirmed.

Costs taxed against appellant.

BY THE  
COURT,

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Circuit Judge

Attest:

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Sally Mrvos, Clerk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

\_\_\_\_\_

PHILIP E. FOSTER,

Plaintiff,

Civil  
Action  
No. 88-  
3692

v.

RUTGERS, THE STATE UNIVERSITY;  
THE RUTGERS COUNCIL OF THE  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS; THE  
PERMANENT PANEL ON PROCEDURES:

AND THE AMERICAN ASSOCIATION  
OF UNIVERSITY PROFESSORS,

: OPINION

Joint and Several  
Defendants.

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SAROKIN, District Judge.

In this wrongful termination action, defendants Rutgers, the State University (Rutgers), the Rutgers Council of the American Association of University Professors Chapters (Council), and the American Association of University Professors (AAUP) now move for dismissal pursuant to Fed. R. Civ. P. 4(j) for failure to make timely service of process. Plaintiff makes several cross-motions.

BACKGROUND

Plaintiff Philip E. Foster was employed as an adjunct professor by defendant Rutgers from 1984 until 1987 when Rutgers failed to renew its three-year agreement with plaintiff. Contending that Rutgers' failure to renew the agreement was wrongful, plaintiff filed a complaint against Rutgers in this court. He joined as defendants the Council, the Permanent Panel on Procedures, and the AAUP.

Plaintiff filed his complaint with the District Court of New Jersey on August 24, 1988. On December 19, 1988, plaintiff mailed process to defendants by certified mail and enclosed Form 18-A, a form required by Fed. R. Civ. P. 4(c)(2)(C)(ii). On December 23, 1988, Rutgers returned Form 18-A. The Council and AAUP also accepted service on this date.

DISCUSSION

TIMELINESS OF SERVICE UNDER FEDERAL  
RULES

Fed. R. Civ. P. 4(j) provides that service of process must be made within 120 days following filing the summons and complaint. Both Rutgers and the Council state that because they received the mailing on December 23, 1988, service was made on defendants no earlier than 121 days after plaintiff filed his complaint.

Under Third Circuit law, service of process under Fed. R. Civ. P. 4(c)(2)(C)(ii), the rule which allows for service by mail, is complete when the defendant signs and returns form 18-A. Stranahan Gear Co. v. NL Industries, Inc., 800 F.2d 53, 56-57 (3d Cir. 1986); Green v. Humphrey Elevator and Truck Co. and Maintenance Co., 816 F.2d 877, 881 (3d Cir. 1987); Braxton v. United States, 817 F.2d 238, 240 note 1 (3d Cir. 1987). Therefore, in this circuit, the individual making the complaint must mail process and



receive the form from defendant within 120 days of filing the complaint. ill)

Absent a showing of good cause or excusable neglect for failure to complete service, dismissal of a complaint is mandatory if the plaintiff fails to meet the timeliness provision of Fed. R. Civ. P. 4(j). Braxton, 817 F.2d at 240; Lovelace v. Acme Markets, 820 F.2d 81, 84 (3d Cir. 1987). Plaintiff claims that he has shown "good cause" for failing to serve process on time. He states that he has met the six-part test set forth in Dominic v. Hess Oil V.I. Corp., 841 F.2d 513 (3d Cir. 1988). In that case, the court found no lack of diligence or inadvertence by counsel that would prevent the court from extending the time period in which plaintiff could serve process. 841 F.2d at 516-17, citing Consolidated Freightways Corp. of Del. v. Larson, 827 F.2d 916 (3d Cir. 1987) and Coady v. Aguadilla Terminal, Inc., 456 F.2d 677 (1st Cir. 1972). Plaintiff here reminds the court on several occasions that he is not represented by counsel, that he is not a litigator, and that he is not admitted to practice law in New

Jersey. However, he is an attorney licensed to practice in New York, and he does state several times in his papers that he researched the federal law regarding service of process. Had he performed such research with diligence, he would have been well aware that service would not be complete until defendants returned Form 18-A, and that he should have mailed process to defendants substantially earlier in order to complete service before the end of 120 days. Had his research been thorough, plaintiff could have readily foreseen the consequences, and contrary to his statement, he did not make substantial good faith efforts towards compliance with the federal rules.

#### SERVICE OF PROCESS UNDER STATE RULES

Plaintiff asserts that, if service was not timely under federal rules, in the alternative his service can be considered made under state rules. Fed. R. Civ. P. (4)(c)(2)(C)(i) states that service may be made "pursuant to the law of the State in which the district

court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State."

Defendants argue that plaintiff's service cannot be considered under state rules, since he enclosed federal form 18-A with his papers. Under Kress v. Scott Instruments, 116 F.R.D. 631 (W.D. Pa. 1987), "[O]nce plaintiff has chosen between state methods of service permitted by Rule 4(c)(2)(C)(i) and the method prescribed by Rule 4(c)(2)(C)(ii), [he/she] is bound to complete service in accord with the section [he/she] has chosen." 116 F.R.D. at 632, citing Billy v. Ashland Oil, Inc., 102 F.R.D. 230 (W.D. Pa. 1984). Because plaintiff mailed process via certified mail rather than by regular mail as prescribed by Rule 4(c)(2)(C)(ii), and because plaintiff did not sign form 18-A as is required by the form, the court will consider whether or not service is proper under state rules.

New Jersey Ct. R. 4:4-4(a)(2)<sup>1</sup> directs that a party may mail service "by registered, certified or ordinary mail[.]" Plaintiff, therefore, followed the proper procedure for mailing service. However, while Fed. R. Civ. P. 4(c)(2)(C)(i) permits the election of the state method for making service, it does not provide that the plaintiff will then be governed by all of the state rules for perfecting service. Plaintiff is therefore still subject to Fed. R. Civ. P. 4(j), and did not meet that rule's provision for timely service.

The court concludes that plaintiff failed to meet the timeliness requirement of Fed. R. Civ. P. 4(j) and that no good cause has been shown to excuse compliance. Therefore, the court will dismiss plaintiff's complaint without prejudice.

### PLAINTIFF'S CROSS-MOTIONS

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<sup>1</sup>New Jersey Ct. R. 4:4(c)(1) is the rule which applies to method of service on corporations, partnerships, and agencies. That rule, however, state that a corporation, partnership, or agency may be served by mail in accordance with Rule 4:4-4(a), which governs service on individuals.

### 1. Declaring Form 18-A Null and Void

Plaintiff asks this court to declare his use of Form 18-A null and void. However, doing so would not prevent a dismissal of plaintiff's complaint since, as was discussed above, plaintiff failed to meet the federal requirement for timely service of process irrespective of whether he was attempting to serve under federal or state rules.

### 2. Evidentiary Hearing to Determine Evasion of Service of Process

Plaintiff asks that the court hold an evidentiary hearing in order to determine whether or not defendants are attempting to evade accepting plaintiff's service of process. However, there are no disputed facts which would warrant such a hearing. Plaintiff does state that Rutgers had the opportunity to thwart service if it actually received plaintiff's mailing on December 21 or 22, yet did not sign and return

Form 18-A until December 23. However, plaintiff failed to take into account that the defendants, under Rule 4(c)(2)(C)(ii), were entitled to have twenty days in which to return the form and complete service of process, and that plaintiff should have taken the needed twenty extra days into account in deciding whether or not and when to mail the papers. Green, 816 F.2d at 883, quoting Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure, 96 F.R.D. 81, 113-14 (1983). The court finds no need for an evidentiary hearing, and denies plaintiff's request.

### 3. Deferring Decision on AAUP Motion

Plaintiff states that because the receipt which would prove the date on which AAUP and the Council received service is not available, this court should defer a decision on AAUP's motion for dismissal until the date can be ascertained. However, as was stated above, the date is irrelevant since the plaintiff did not

mail process in time to afford the defendants the  
twenty days

needed to return Form 18-A. There is no reason to defer decision on AAUP's motion.

#### 4. Enlargement of Time in Which to Serve Process

Plaintiff claims that because his enclosed Form 18-A was not signed, defendants are not within their rights in moving for dismissal. However, plaintiff cannot assert his own deficiency regarding his method of service, especially in light of the fact that plaintiff's service was untimely whether he was following the service procedures under federal or state rules. The court denies plaintiff's cross-motion for sanctions.

Defendants' motions for dismissal will be granted for plaintiff's failure to meet the Rule 4(j) requirement that service of process be completed within 120 days of filing the complaint. This dismissal is without prejudice; plaintiff may file his complaint again and attempt to serve process on defendants. If he does so in a timely fashion, and if any defendant



fails to return Form 18-A within the required twenty days, that defendant will bear costs of personal service.

Plaintiff's cross-motions are denied.

CONCLUSION

Defendants' motion to dismiss for failure to make timely service of process is granted, and the complaint will be dismissed without prejudice.

Plaintiff's cross-motions are denied.

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H. LEE SAROKIN,  
U.S.D.J.

Date: May 3, 1989

Original to Clerk, U.S. District Court

Copy to: Hon. Ronald J. Hedges, U.S. Magistrate

Mr. Philip Foster  
23 E. 81st Street  
New York, NY 10028

Carpenter, Bennett & Morrissey, Esqs.  
(Attn: Linda B. Celauro, Esq.)  
Three Gateway Center  
100 Mulberry Street  
Newark, NJ 07102-4082

Reinhardt & Schachter, Esqs.  
(Attn: Paul Schachter, Esq.)  
744 Broad Street  
Newark, NJ 07102

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

PHILIP E. FOSTER,

Plaintiff,

Civil  
Action  
No. 88-  
3692

v.

RUTGERS, THE STATE UNIVERSITY;  
THE RUTGERS COUNCIL OF THE  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS; THE  
PERMANENT PANEL ON PROCEDURES;  
AND THE AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS,

ORDER

:

Defendants.

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This matter having been opened to the court on the motion of defendants Rutgers, the State University, the Rutgers Council of the American Association of University Professors, for dismissal pursuant to Fed. R. Civ. P. 4(j) for failure to make timely service of process and on the cross-motions of plaintiff; and the court having read and considered the papers submitted by the parties; and for the reasons expressed in the accompanying opinion,

IT IS this 3, day of May, 1989, hereby ORDERED that plaintiff's cross-motions be and hereby are denied, and it is further

ORDERED that defendants' motion to dismiss pursuant to Fed. R. Civ. P. 4(j) be and hereby is granted, and it is further

ORDERED that plaintiff's complaint be and hereby is dismissed without prejudice.

---

H. LEE  
SAROKIN,  
U.S.D.J.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

MEMORANDUM OPINION AND ORDER

January 11, 1990

Mr. Philip E. Foster  
23 East 81st Street  
New York, NY 10028

Linda B. Celauro, Esq.  
Carpenter, Bennett & Morrissey  
Three Gateway Center  
100 Mulberry Street  
Newark, NJ 07102

Paul Schachter, Esq.  
Reinhardt & Schachter, Esq.  
744 Broad Street, Suite 3100  
Newark, NJ 07102

Re: Foster v. Rutgers et al.. Civ. No. 88-3692

Dear Litigants:

Before the court are two motions currently pending in the above-referenced matter: defendant Permanent Panel on Procedures motion for dismissal of the action (and plaintiff's related cross-motion), and plaintiff's motion for reconsideration of court's order May 3, 1989.

BACKGROUND

Plaintiff Philip E. Foster was employed as an adjunct professor by defendant Rutgers, the State University, from 1984 to 1987, when Rutgers failed to renew its three year contract with plaintiff. Plaintiff filed the complaint in this action on August 24, 1988, against the permanent Panel on Procedures ("PPP") and other defendants.

The PPP is an arbitration panel constituted pursuant to Article X of the collectively negotiated agreement between Rutgers and the Rutgers Council of American Association of University Professors ("AAUP") Chapters. The PPP is composed of three employees of Rutgers. One member is appointed by Rutgers, another is appointed by the AAUP. Plaintiff alleges, in part, that the PPP "acted with partiality, arbitrarily and capriciously, with prejudice, without proper procedure, reached conclusions unsupported by and contrary to the evidence, failed to and abused its discretion to the harm and injury of plaintiff." Complaint, Para. 86, Count 6.

### DISCUSSION

#### The Motion to Dismiss and Cross-Motions

On a motion to dismiss, all factual allegations of the complaint must be accepted as true. D.P.



Enterprises, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984). A complaint may only be dismissed if the moving party establishes that the claimant is not entitled to relief under any state of facts which could be proved to support its claim. Fed. R. Civ. P. 12(b)(6); Leone v. Aetna Cas. & Sur. Co., 599 F. 2d 566, 567 (3d Cir. 1984), citing, Conlely v. Gibson, 355 U.S. 51, 55-56 (1957)

PPP raises a number of grounds for dismissal, including defendant's immunity from suit. Arbitrators are "clothed with an immunity, analogous to judicial immunity," against any actions brought arising out of the performance of arbitral duties. Cahn v. International Ladies Garment Union, 311 F.ad 113, 114-115 (3d Cir. 1962). See, Larry v. Penn Truck Aids, Inc., 94 F.R.D. 708, 724 (E.D. Pa. 1982). Based on this doctrine, courts have consistently held that neither panels of arbitrators nor individual members are proper party defendants in actions arising out of the performance of arbitrai duties. Ozark Air Lines, Inc. v. National Mediation Bd., 797 F.2d 557, 564 (8th Cir.

1986); UAW v. Greyhound Lines, Inc., 701 F. 2d 1181, 1186 (6th Cir, 1983); Yates v. Yellow Freight System, 501 F. Supp. 101, 105 (S.D. Ohio 1980). Plaintiff complaint names PPP based on a number of the Panel's decisions and procedures. Complaint, Para. 51-69.

Public policy dictates this result. The role of an arbitrator is similar to that of a judge, necessitating insuring that the decision maker may act without fear of subsequent litigation. Wasyf, Inc. v. First Boston Corp., 813 F. 2d 1579, 1582 (11th Cir. 1987). See, Austin Mun. Securities v. Nat. Ass'n of Securities, 757 F.2d 676, 687-688 (5th Cir.). As the United States Court of Appeals for the Seventh Circuit explained: "[I]ndividuals cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit." Tamari v. Conrad, 552 F.2d 778, 781 (1977). The extension of immunity is also consistent with federal policy that supports the resolution of disputes by arbitration. Wasyf, 813 F.2d

at 1582. See, e.g., the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq. (1982); UAW, 701 F.2d 1101 (citing policy supporting the arbitration of labor matters).

Plaintiff urges that where the relief sought is equitable relief, the policies supporting immunity are of less force. The court is aware of no case making such a distinction. When a party seeks equitable relief, the risk exists that a party is using the lawsuit to substitute for an action seeking judicial review. For the foregoing reasons, the court dismisses plaintiff's complaint with prejudice.

The court need not reach the merits of the other claims raised by defendant. Plaintiff makes a number of cross-motions, all of which are moot because of this court's dismissal of the action against PPP. The court denies the cross-motions, including the application for sanctions.

#### B. The Motion for Reconsideration

Plaintiff moves for reconsideration under Rule 59, Fed. R. Civ. P., of this court's decision of May 3, 1989, dismissing process. Rule 59 and Local Rule 12I require that a motion for reconsideration be filed within ten days after the filing of the court's order. Defendants claim that plaintiff's motion was not timely.

Plaintiff motion was received on May 19, 1989. Excluding weekends as Rule 6 requires, Fed. R. Civ. P., the court concludes that the motion is two days late. the court, therefore, does not have jurisdiction to address the merits of this motion. Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978), reh'g. denied, 434 U.S. 1089 (1978).

The court may grant the relief sought in a Rule 59(e) motion notwithstanding the passage of the ten day period under Rule 60(b). Fed. R. Civ. P. Motions under Rule 60(b) are addressed to the sound discretion of the court. Ross-v. Meagan, 638 F.2d 646, 648-649 (3d Cir. 1981). the court interprets plaintiff's application as a claim that this court's decision was

mistaken. Rule 60(b)(1). The arguments raised by plaintiff repeat issues which were fully briefed prior to the disposition of the first motion to dismiss. The court continues to abide by its prior decision.

CONCLUSION

For the foregoing reasons, PPP's motion to dismiss is granted. Plaintiff's cross-motion and motion for reconsideration are denied.

SO ORDERED.

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H. LEE  
SAROKIN,  
U.S.D.J.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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PHILIP E. FOSTER,

Plaintiff,

Civil

Action

No.88

3692

ORDER

v.

RUTGERS, THE STATE UNIVERSITY;  
THE RUTGERS COUNCIL OF THE  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS; THE  
PERMANENT PANEL ON PROCEDURES;  
AND THE AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS,

Defendants.  

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This matter having been opened to the court by counsel for defendant, the Permanent Panel on Procedures, for an order dismissing this action and by plaintiff for reconsideration of the court's decision of May 3, 1989; and the court having received opposition; and the court having reviewed the papers without oral argument, pursuant to Rule 78, Fed. R. Civ. P.; and the court having considered the dispositive legal issues; and for the reasons expressed in the accompanying opinion; and for good cause

IT IS this 12th day of January, 1990 hereby  
ORDERED THAT defendant's motion to dismiss is  
granted and it is further

ORDERED THAT the complaint is dismissed  
with prejudice and it is further

ORDERED THAT plaintiff's motion for  
reconsideration is denied.

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H. LEE  
SAROKIN,  
U.S.D.J.



UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

January 26,

1990

Philip E. Foster  
23 E. 81st  
New York City, NY 10028

Re: Foster v. Rutgers  
Civil Action No. 88-3692

Dear Mr. Foster:

The court acknowledges receipt of your letter of January 18, 1990. The order is hereby amended to indicate Docket Number 88-3692 rather than 89-3692. The dismissal is with prejudice for the reasons expressed by the court in its Memorandum Opinion dated January 11, 1990.

Very truly  
yours,

H. Lee  
Sarokin,  
U.S. D. J.

HLS/jm

cc: Linda B. Celauro, Esq.

Paul Schachter, Esq.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 90-5117

---

PHILIP E. FOSTER,

Appellant

v.

RUTGERS, THE STATE UNIVERSITY;  
THE RUTGERS COUNCIL OF THE  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS; THE  
PERMANENT PANEL ON PROCEDURES;  
AND THE AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS, Joint and Several

---

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, Chief Judge,

SLOVITER, BECKER, STAPLETON,  
MANSMANN, GREENBERG,  
HUTCHINSON, SCIRICA, COWEN, NYGAARD,  
ALITO and WEIS, \* Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

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Circuit Judge

\* Judge Weis voted only as to panel rehearing

*Supreme Court of the United States*

No. A-362

Philip E. Foster,

Petitioner

v.

Rutgers, The State University, et al.

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ORDER

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UPON CONSIDERATION of the application  
of counsel for the petitioner,

IT IS SO ORDERED that the time for filing a  
petition for a writ of certiorari in the above-entitled  
case, be and the same is hereby, extended to and  
including December 1, 1990.

David H.

Souter

Associate

Justice of

the

Supreme

Court of

the

United

States

Dated this 14th

day of November, 1990.

UNITED STATES DISTRICT COURT  
NEWARK, NEW JERSEY

---

PHILIP E. FOSTER,;

Plaintiff,

Civil

Action

No. 88-

3692

(HLS)

v.

RUTGERS, THE STATE UNIVERSITY;  
THE RUTGERS COUNCIL OF THE  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS THE

COMPLAINT

PERMANENT PANEL ON  
PROCEDURES;AND THE  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS,

Joint and Several

Defendants.

---

Plaintiff, for his claims against Defendants, states and alleges:

The Parties

1. Plaintiff Philip E. Foster is a citizen of the State of New York and resides at 23 East 81st Street, New York, N.Y. 10028.
2. Defendant Rutgers, The State University, is established under and exists by virtue of the laws of the State of New Jersey; and a citizen of New Jersey and Maintains headquarters in New Brunswick NJ .
3. Defendant Rutgers Council of the American Association of University Professors is the recognized collective bargaining agent for faculty of Rutgers, the



State University, and a citizen of New Jersey and Headquartered in New Brunswick, NJ.

4. Defendant Permanent Panel on Procedures is a body composed under a collective bargaining agreement entered into on or about July, 1983 and consisting of one person appointed by Rutgers, The State University, on by the Rutgers Council of the American Association of University Professors, and a third person jointly appointed by the University and the Council. The Council is a citizen of New Jersey and Functions in New Brunswick, NJ

5. Defendant The American Association of University Professors is a national professional association of chapters such as the Rutgers Council; it is headquartered in Washington, D.C.

Jurisdiction

6. This Court has jurisdiction over the subject matter of this action under: (a) 28 U.S.C. 1332 in that there is diversity of citizenship between the parties and the amount in controversy exceeds \$10,000; (b) 42 U.S.C. 1983 in that Plaintiff has been deprived of his Federally protected civil rights as further alleged herein below; and (c) the doctrine of pendent jurisdiction in that Plaintiff's claims under state law are inextricably related to his claims under Federal law. also federal question jurisdiction under 28 USCA 1331 and 1337.

7. This court has personal jurisdiction over the Defendants as a consequence of their actions and those of their agents in and in conjunction with acts in Newark, New Jersey as more fully alleged herein below, and by virtue of their headquarters' location and acts in New Brunswick, N.J.

### Background

8. On or about August 15, 1984, Plaintiff Foster entered into a three-year employment agreement as an Associate Professor at Rutgers's Graduate School of Management is a division of the University.

9. Prior thereto Foster was led to believe by Allan Roth, then head of the Environment Area in which Foster was to teach, and David Blake, then Dean of the GSM, that the position was a tenure-track position and that his three-year contract would be renewed so that he would be considered for tenure at the end of a t least six years at the University.

10. The 1986-88 University " Handbook for Faculty ", P. 48 specifically states that " the normal period of probationary appointment for a faculty member at the University . . . is six years . . . .".

11. In reliance upon the representations of Roth and Blake, Foster gave up his prior professional activities and changed his career path in order to become a

university professor at Rutgers or, if tenure were not awarded after six year or more, elsewhere.

11. Shortly after his arrival at Rutgers, Roth proposed a teaching schedule which contradicted promises he had made prior to Foster's acceptance of the School's offer. When Foster pointed this out to Roth, Roth's attitude toward Foster changed from friendly to cold and disinterested. As a result of this and other such schedule of classes Foster was deprived of time necessary for work on research and publication.

#### The First Article IX Grievances

12. As a result of Roth's conduct, and certain other matters set forth herein below, the Council filed Article IX grievances on Foster's behalf with the University in March and April, 1986.

13. Foster was not a member of the American Association of University Professors nor a member of

the Council, but was informed by the Council that any complaints about the University or its employees had to go through the Council. As a result of what he was told, Foster did not pursue these matters himself, much as he would have preferred.

14. On March 27, 1986, the Council filed an Article IX grievance charging, under the bargaining agreement entered into by the Council and the University, violations of administrative decisions and agreements with Foster regarding the scheduling of his classes.

15. Although such charges constituted a grievance and were fully supported by the record submitted, Susan Cole, Vice-President of the University for Personnel, found that such charges did not constitute a grievance and denied the relief sought by Foster.

16. Cole's finding, however, was unsupported by the record, was arbitrary and capricious, and constituted an abuse of discretion.

17. Prior to his accepting the offer at Rutgers, Blake promised Foster that the School would provide advice and guidance to him in carrying out his teaching and research activities, and Roth implied that he too would provide such advice and guidance as Foster was new to this academic world and would be giving up his prior career if he were to accept the position.

18. Under the terms of the bargaining agreement Foster is entitled to enjoy such rights as specified in the University Regulations, one of which required that Roth "see that adequate supervision, advice and training are afforded new members of the department".

19. Moreover, another regulation requires that Roth inform Foster of his research and publication obligation at the time of his appointment and periodically thereafter.

20. Consistent with his cold and disinterested attitude toward Foster, Roth, who had not explained these obligations at the time of his appointment, refused and failed to provide Foster with advice and guidance as required.

21. Another University regulation required Blake to provide direction for Roth in matters such as giving advice and guidance, but even though Foster went to Blake after Roth refused to assist him, Blake failed to take any steps to see that Roth provided the required assistance.

22. As a result of Roth's lack of assistance, and Blake's failure to see that Roth offered such assistance, Foster was left to flounder, expending, fruitlessly, valuable research and publication time.

23. On March 27, 1986 the Council filed a second Article IX grievance alleging violations of the

aforesaid regulations in failing to provide advice to Foster as required.

24. This grievance was timely filed, and fully supported by the record. Nevertheless, Elizabeth Mitchell, a University employee and agent of Cole, found the grievance to be untimely and she dismissed the charges.

25. Mitchell's finding, however, was unsupported by the record, was arbitrary and capricious, and an abuse of her discretion.

26. Despite the foregoing problems in scheduling and lack of advice, Foster submitted the first draft of a research paper to his departmental research typist in late July, 1985, and expanded drafts soon thereafter.

27. Prior to his acceptance of the offer of the position, both Blake and Roth had assured Foster he would receive sufficient support from the School to prepare



and submit his research work. Never- insufficient typing support resulted in excessive and numerous delays in the preparation of his manuscript.

28. Foster notified Roth and Blake of the typing delays, apparently due to priority being given by the typist to material which was not needed for a personnel review as was Foster's manuscript, and when they refused to do anything about this matter, Foster notified Norman Samuels, Provost of the Newark campus of the University. Even though the Provost then suggested to Blake that priority be given to my manuscript since it was for Personnel review, Blake refused to provide such priority.

29. As a result of the time lost due to these delays, Foster was prevented from preparing and submitting a publishable manuscript before his review; had he had adequate typing support he could have submitted a manuscript which definitely would have entitled him to have had his contract renewed. Given the way the

work was processed, there never was time for Foster to take the material to an outside typist.

30. On March 27, 1986 the Council filed a third grievance with the University charging that the delays and inadequate typing support violated University policy and administrative decisions.

31. Although this third grievance was fully supported by the record, Mitchell found that the charges did not constitute a grievance and denied again the relief sought by Foster.

32. Mitchell's aforesaid decision and finding is unsupported by the record, arbitrary and capricious, and an abuse of discretion.

33. Although the University normally reviews 3 year appointees in the beginning of their second year at the University, where a person has not had significant prior graduate research and/or teaching experience in

the area in which he was appointed, as was the case with Foster, such a person is usually given a one-year preliminary appointment so that in effect they are not reviewed until the beginning of their third year at Rutgers. The purpose of such a policy is to enable such an appointee to have sufficient time to prepare adequate research materials for review.

34. In addition, Rutgers usually also gives one year extension to faculty members who have not had a preliminary year in order for them to complete research so that they may be fairly reviewed.

35. By refusing to hold Foster's review in the beginning of his third year, Blake and Roth deprived Foster of a fair opportunity to show his research and publication potential. Had he had the extra time, Foster would have presented materials which would have assured his contract renewal.

36. On April 30, 1982, the Council filed a fourth grievance alleging that failure to allow Foster sufficient time to present his work violated University regulations, the bargaining agreement, and University policy. Although such claims were timely filed and fully supported by the record, Mitchell again found the claim untimely and denied Foster the relief sought.

37. Mitchell's finding and conclusion with respect to the forth grievance is without support in the record, arbitrary and capricious, and constitutes an abuse of discretion.

38. Foster had notified the Council about the failure of Roth and Blake to provide advice and guidance in a timely fashion and with sufficient time for the Council to file a timely grievance.

39. Foster also notified the Council of the premature review in a timely fashion and with sufficient time for the Council to file a grievance in a timely fashion.

40. If, in the alternative, these two grievances were untimely filed, then the Council acted in a grossly negligent fashion, failed to adequately represent Foster, and mishandled these two grievances to Foster's detriment.

#### The Article X Grievance

41. In January, 1986, Foster submitted his materials for the personnel review to determine whether his three-year contract would be renewed for a second three-year period, as he was told by Roth that the review would proceed whether or not he submitted them at this time.

42. The review of these materials was conducted in the Spring of 1986: On February 17, the Environmental Department voted against renewal; as did the Appointment and Promotion Committee on February 26, Dean Blake on May 15 and Provost Samuels on June 3. There were numerous procedural and

substantive violations during this review which resulted in the various determinations against renewal. These violation were discussed by Foster with the Council and a draft statement with regard to them was prepared by Foster and submitted to the Council.

43. On September 8, 1986, the Council prepared and submitted "A Filing Form, Article X" outlining the facts and bases for these violations. Various changes were made pursuant to various decisions and a revised Filing Form was filed on March 31, 1987. These and other required steps were taken in order to proceed to arbitration on the University's decision not to renew Foster's contract.

44. The next required step was for Foster to submit an Expanded Grievance Statement to Cole by April 29 (EGS). The EGS set out in detail the facts and bases for the procedural and substantive violations incurred in Foster's review. Although Foster continued to have difficulties in obtaining typing support due to Dean

Davis's interference, Dean Davis had specifically informed Foster on February 18 with regard to the meeting of deadlines on grievance materials that " we will do what we can ".

45. Foster drafted and gave the EGS to his research typist, who upon understanding the urgency and importance of the matter, promised to have the final version done by April 22. Foster prepared a cover letter to Cole dated April 22 and gave it to his secretary, Rosa, instructing her to mail it with the EGS to Cole when she received the EGS from the research typist on or before April 22. This occurred shortly before April 22, for as it was the end of the term, Foster explained to his secretary that he would not be at the School but at home for some weeks.

46. On April 22, Foster spoke with Rosa by phone to confirm that she had received and mailed the EGS and cover letter as instructed. Rosa told Foster that she had been forbidden by Dean Davis to mail it. Foster

then spoke with Grace Andes, the head departmental secretary, explained the situation to her, and asked that she mail it for him. She was informed of the importance and urgency of the matter and agreed to mail it for him on April 22 or 23. However, unbeknownst to Foster, Andes refused to mail the EGS and instead put it in his mail box for him. Apparently Dean Davis had prohibited Grace from mailing it after she spoke with her and had been promised that it would be sent.

47. Sometime thereafter Foster received a memo from Davis dated April 22 indicating that his secretarial service time had been used up, but no mention was made of the EGS or of assistance by the departmental head.

48. On April 30, the University Reviewing Officer communicated to the Council certain matters regarding changes in the Filing Form, and the Council informed Foster of these suggestions on May 4,



together with evidence that they had received notice that the EGS had been submitted.

49. On May 20, Foster returned for the first time to the School and discovered to his astonishment that the EGS had not been mailed. Inquiries were made as to what to do about the EGS and Dean Davis's conduct, and a copy of the EGS was sent forthwith to Cole, together with the original cover letter and an explanatory note indicating that the original was to have been sent to her on April 22.

50. On or about June 4, after receiving the EGS mailed on May 20, the University unilaterally determined that the Article X grievance was no longer viable, and refused to take the next step, which was the appointment of a committee to hear the grievance.

51. In early June, 1987, the Council filed an appeal with the Permanent Panel on Procedures challenging the University's determination that the grievance was

no longer valid. At the time, the Panel consisted of Jean Ambrose, Assistance Vice President for Faculty Affairs, reporting directly to Cole the very person who had informed the Council on or about June 4 that the University considered the grievance invalid; Robert Boikess, a faculty member, and Terrence Butler, a faculty member who also holds administrative positions; the later serving as chair.

52. On July 2, the Panel, based on the Council and the University's submissions formulated the questions as "Was Dr. Foster's delay in filing the (EGS) sufficiently unreasonable to render the grievance withdrawn ". As Foster was now unemployed, he pressed for a determination of the issue. On August 3, Butler told Foster that the panel was not being convened because the Council was not ready to go forward. Under the bargaining agreement, the Panel was to render a decision within 7 days from the filing of the appeal, but by now two months had passed.

53. Foster prodded the Council to expedite this matter and also to clarify certain issues before the hearing: Foster, through the Council, claimed the University had to prove that it suffered prejudice or harm from the one month delay in filing, and that if it could, then he had to demonstrate good cause for the delay.

Foster requested through the Council that these point and others be clarified prior to the hearing. In addition, as the Council did not properly present these points to the Panel, Foster also wrote to the Panel directly concerning these matters.

54. On August 24, the Panel responded to these requests, indicating that it would first determine if the delay was reasonable, and if not, was the University prejudiced, in order to invalidate the grievance. The Panel did not address the question of who has the burden in each of these two steps. On August 30 Foster voiced his displeasure with the Panel's plan to the Council, indicating that the Council should insist that under the bargaining agreement, once the EGS is

filed, the University must convene the committee to hear the grievance, and that if they refuse to do so then they must justify their actions, not Foster his. The Council failed to present this matter to the Panel.

55. A hearing was held on Sept. 14 without Foster present at which the Panel considered a claim by Foster that a prior delay of 69 days in an earlier procedural step was attributable to the University and stated in part in its determination that this delay was caused in part by Foster's failure to make certain inquiries. This issue was to be of importance in the resolution of the alleged delay in filing EGS. Apparently the Council told the panel that Foster was responsible for the delays, which was not true as stated.

56. On September 28, a hearing was held by the Panel, at which Foster was present, on the reasonableness of his delay in filing the EGS. Foster was there as a witness, and Wells Keddle was there as a presenter for

the Council. A request by Foster through Keddie to tape record the proceedings was denied by the Panel.

57. First, Keddie was required to present Foster's case that the delay was not unreasonable, rather than, as Foster had asked, the University be required to go forward and show that the delay was unreasonable. Thus, Foster was required to prove a negative, and to carry the burden of proof, whereas it was the University which ought to have had this obligation. Keddie failed to speak up; to effectively present and defend Foster; was perfunctory and wholly inadequate.

58. Although the University had agreed to present no surprise evidence, when it presented it submitted a lengthy memo to the panel. Keddie did not object, but upon Foster's insistence he did. The Panel first read the material, then decided it would not consider it; but having read it, it was already prejudiced by its contents.

59. The University also wanted to call a surprise witness, Dean Davis, to which again Foster through Keddie objected, and the panel agreed not to hear her testimony. Discussion as to what she would say was heard by the Panel.

60a. Ambrose, a member of the panel, already having decided that the delayed ESG invalidated the grievance, was clearly prejudiced against Foster. Keddie knew this, but failed to object.

60b. After Keddie weakly rebutted the University's presenter, the University was allowed a sur-rebuttal.

61. On October 1, the Panel determined that the delay in filing the EGS was unreasonable, and that a further hearing on the issue of prejudice to the University would be held. No reasons whatsoever were given for the conclusion that the delay was unreasonable. Foster maintains that the reasons for the delay presented to the Panel by him together with the

written evidence submitted by him which documented the allegations of fact set forth herein above fully support the contrary conclusion, namely that the delay was reasonable; that the record including the evidence submitted by the University fully substantiates that conclusion; that the decision of the Panel was unsupported by the evidence, arbitrary and capricious, an abuse of discretion, and tainted by prejudice.

62. Shortly after the hearing, on Sept. 28, Foster informed the Panel that his alleged contribution to the 69 day delay was based on advice given to him by the Council, and that it was intentional and not inadvertent part of the strategy recommended by the Council to him. Foster had been advised against bringing this up at the hearing by Keddie. On Oct. 12, much to his astonishment, Keddie wrote to the panel indicating the Council had never so advised Foster. This clearly must have prejudiced the Council against Foster, and yet there can be no sensible reason for Keddie to have written to the Panel as the issue

involving the delay of 69 days had been decided on Sept. 14 and the issue of the unreasonable delay in the EGS had been decided on Oct. 1. Keddies denunciation, however, apparently had dire consequences for the outcome of the issue of whether the University had suffered any harm for the ESG delay.

63. By Sept. 28, Foster was beginning to suspect that something was afoot with the Council. The Council had sent a copy of a confidential letter from Wasson to me of April 20 to Cole, and it appeared that the Council and the University were conspiring to delay the proceedings through the summer. Then Keddies letter of Oct. 12. Foster became convinced that the Council was caving in and not properly representing him against the University.

On Nov. 1, Foster wrote to Keddies and complained to Keddies about the weakness of the arguments he made at the Sept. 28 hearing and offered to discuss this



matter with him with a view to the second hearing. Keddie did not reply.

64. On Nov. 11 the Council informed Foster that a hearing had been held and a decision by the Panel reached on Oct. 29 that " given the substantial unreasonableness of Dr. Foster's delay . . .and the measure of injury to the University, the Panel holds that Dr. Foster's Article X grievance is withdrawn ". The decision had been reached again with Ambrose serving on the Panel. No mention was made in the decision of what injury the University allegedly suffered by the 1 month delay in the filing.

65. Foster requested that Keddie request the PPP provide clarification of its decisions, and that Keddie indicate what evidence was presented at the second hearing, and how this evidence was rebutted, but Keddie and the Panel have failed to respond to these requests. Even so, Foster alleges that no evidence could have been presented which could justify

sufficient injury to the University, upon which the Panel could have reached the conclusion it did. Foster alleges Ambrose on Panel; Keddie knew but did not object to prejudiced Ambrose; Keddie failed to fairly represent Foster, was perfunctory, wholly ineffective presenter.

66. Foster maintains that the decisions of the Panel on unreasonable delay and injury to the University are clearly erroneous on the basis of the record, that they are not substantiated by a preponderance of the evidence, and that the decisions were infected with a denial of due process in that taping of the proceedings was prohibited, prejudicial evidence was introduced, there was no established procedure of presentation, the burden of going forward and of proof was placed on the wrong party, and the allowance of the University to a sur-rebuttal was improper. Foster further contends that the Council acted recklessly in the hearings, proceeding in a perfunctory manner, so as to prejudice and jeopardized Foster's position.

67. Related to the foregoing is Foster's claim that under the bargaining agreement if his Article X grievance was not decided prior to the termination of his employment, as it was not, that he was entitled to an extension of his contract. This issue was brought to the Council by Foster, but the Council refused to bring this claim to the Panel after the University refused to extend his employment. Instead, the Council met with the University and jointly agreed not to raise this issue with the Panel. Although the Council proposed filing an additional and separate grievance with the University, the Council failed to do so entirely.

#### The Second Article IX Grievance

68. On July 1, 1987, at Foster's urging, the Council filed a new Article IX grievance alleging inequitable allocation of secretarial resources by Dean Davis and Dean Upton violating University Regulations and the collective bargaining agreement. Protracted and ultimately unsuccessful efforts were made to obtain

documents from the University to substantiate this claim. On March 30, 1988, a meeting was held by Keddie and Ambrose pursuant to which Ambrose determined that the claimed violation

of the University regulation does not constitute an Article IX grievance and that they had not discriminated against Foster in the allocation of such services in contravention of the bargaining agreement.

69. Foster maintains that the record does not substantiate such a conclusion, that the decision was arbitrary and capricious, and an abuse of discretion, and in the alternative, that Foster was denied access to documents with which he might have substantiated his claims. Dean Davis had arbitrarily determined how much secretarial service Foster was to have, and did so with the intent to deprive him of his fair share of such service. Given his prior experience with arbitration, Foster decided not to proceed with arbitration of this decision, but requested the Council to take the matter

to court. He has not had a determinative answer from the Council, and has decided to proceed himself with this claim. It also appeared to Foster by this point that the Council was no longer effectively representing him, and that he ought to proceed on his own, something he had hoped to do from the very beginning of these troubles.

### Miscellaneous

70. The collective bargaining agreement in effect at the time of Foster's employment provided that he shall be entitled to enjoy " all terms and conditions of employment . . . provided for in the University Regulations and Procedures Manual " as well as those provided in the agreement itself.

71. A second employment contract signed by Foster in the Fall of 1984 further entitles him to the benefits set forth in a booklet entitled " Policy with Respect to

Academic Appointments and Promotions ", 1969 as amended.

72. The University, the Council, and the Panel deprived Foster of his rights and privileges as set forth in the agreement, the regulations, the manual and the booklet, and the contracts.

73. As a consequence of the aforesaid acts of the Defendants, Foster standing in the academic community was seriously jeopardized and his ability to take advantage of other employment opportunities has been seriously limited.

74. By virtue of the provisions in the manual, booklet, regulations, employment contracts, and the contractual relationship arising out of Defendants' conduct, both actual and implied, Foster acquired a property right to a renewal of his contract by the University.

### Count I

75. Plaintiff repeats the allegations contained herein above

76. Defendants violated the civil rights of Foster protected by the Constitution of the United States in that he was denied due process and equal protection of the law.

77. The University is an instrumentality of the State of New Jersey, and the actions of Blake, Roth, Davis, Upton, and the other employees of the University heretofore alleged were the duly authorized actions of said State instrumentality.

Count 2

78. Plaintiff realleges the allegations of contained herein above.

79. Defendants violated the civil rights of Foster protected by the Constitutions of the States of New York and of New Jersey in that he was denied by Defendants' due process and equal protection of the law.

Count 3

80. Plaintiff realleges the allegations contained herein above and further alleges that Blake and Roth believed and knew that Foster would not be given tenure when and if he was to come up for tenure because there would be no opportunity to offer anyone teaching the classes Foster was to teach a tenured position, yet they led Foster to believe that he could receive tenure if he was otherwise deserving of such an appointment, and further that Roth and Blake and other employees of the University determined not to renew Foster's contract in order to avoid having to face the fact that there would be no tenure slot for him at the end of another three or four years.



81. Foster was fraudulently induced by Defendant Rutgers, The State University, through the duly authorized acts of its agents, in entering into a contractual relationship with the University, and such deception was maintained even after Foster had begun his performance under said contract.

Count 4

82. Plaintiff realleges the allegations contained herein above and further alleges that the University, through its duly authorized agents acting within the scope of their duties, entered into both a contract with Foster and a contract with the Council of which Foster was a third-party beneficiary.

83. The University breached the actual and implied covenants of these agreements in the performance of their obligations thereunder, and so did in bad faith through both actions and failing to take action, as a

result of which Foster suffered emotional distress from December 16, 1984 until the present.

Count 5

84. Plaintiff realleges the allegations set forth above.

85. Defendant Council and Defendant Association, through the acts of the Council, wrongfully interfered with the Plaintiff's contractual relationship with the University, breached their duty of fairness of representation of Plaintiff, acted in bad faith, with hostility, perfunctorily, failed to pursue matters fully and adequately, and ultimately conspired with the Defendant University to Plaintiff's disadvantage and harm, and further acted recklessly, wantonly, and indifferently toward Plaintiff, all to the harm and injury of Plaintiff. Also with malice and intent to harm Foster.

Count 6

86. Plaintiff realleges the allegations set forth above.

87. Defendants Panel and University, through its agents, duly authorized within scope of duty, acted with partiality, arbitrarily and capriciously, with prejudice, without proper procedure, reached conclusions unsupported by and contrary to the evidence, failed to properly allocate the burden of going forward and of proof, and abused its discretion to the harm and injury of Plaintiff.

WHEREFORE, Plaintiff demands judgement against Defendants awarding him:

A. Vacatur of the decisions of the Panel determining that the Article X grievance should be withdrawn and an order that the University proceed forthwith with its response to the EGS;

B. An Order granting Plaintiff the relief sought in his Article IX grievance, including the renewal of his 3 year contract,

C. Monetary relief in the aggregate amount of \$1,000,000, together with interest according to law;

D. Plaintiff's costs, fees, expenses and disbursements incurred as a consequence of this action; and

E. Such other relief as this court deems just and equitable.

Dated:

\_\_\_\_\_  
Philip E.

Foster

23 East

81st

Street

Case No. A-362

137

New

York,

N.Y.

10028

tel.212-

988-3306

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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PHILIP E. FOSTER, Plaintiff,

Index

No. 88-3692

(HLS)

v.

RUTGERS, THE STATE  
UNIVERSITY ET AL.,

AFFIRMATION  
OF  
PHILIP FOSTER  
IN  
OPPOSITION TO  
DEFENDANTS  
MOTIONS TO  
DISMISS  
AND QUASH  
AND IN  
SUPPORT  
OF

Joint and Several

Defendants.

PLAINTI  
FF'S  
CROSS-  
MOTIONS

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Philip Foster, an attorney duly admitted to the practice of law in N.Y. affirms the following to be true:

1. I am the plaintiff in this action and make this affirmation in opposition to the motions to dismiss and to quash of defendants Rutgers, The State University ( "Rutgers" ), The Rutgers Council of the AAUP ( "the Council" ), and the American Association of University Professors ( "AAUP" ) and in support of my several cross-motions as explained more fully in my brief.
2. I graduated law school in 1977 and, having no interest in being a litigator, took only one course in civil procedure, the required first-term course. I was

admitted to the practice of law in the State of new York in 1980 and have neither applied for nor been admitted to the practice of law in New Jersey or the Third Circuit. During the period 1978-84 my legal work consisted of almost all corporate and securities work, and from 1984-88 I was engaged in teaching corporate or securities law and, part-time, practicing corporate and securities law. I am not and never have been a practicing litigator, and aside from some pro se matters, have had very little litigation experience. Defendants and their counsel knew that I am business attorney, primarily an academic, and not a practicing litigator when commencing this action.

3. As a result of problems with my area chairman at Rutgers and the administration at Rutgers in 1984-86, and at the suggestion and upon the advice of the Council, the Council filed on my behalf 4 grievances with Rutgers ( the " First Article IX Grievance "). Upon the filing of these grievances with Rutgers, the Council notified its counsel, Reinhardt and Schachter



("R&S") of the actions it was taking with regard to these grievances. A true copy of the letter containing such notice is attached as Exhibit A hereto, a letter dated Mar. 27, 1986. As the Council pursued these grievances with Rutgers, they discussed the proceedings with R&S. A true copy of a letter referring to such discussion dated June 6, 1986 is attached hereto as Exhibit A-2, a third such letter, from R&S to the Council dated July 23, 1986 is attached hereto as Exhibit A-3, and a fourth letter referring to such discussions dated 8/5/86 is attached hereto as Exhibit A-4.

4. After Rutgers perfunctorily decided all four of the First Article IX Grievances adversely to me, I discussed the possibility of challenging these determinations in court with the Council and sought its help in so doing. The Council notified R&S of the possibility of court proceedings in this regard. A true copy of a letter containing such notification dated August 21, 1986 is attached hereto as Exhibit B. The

merits of this challenge were discussed by the Council with R&S and thereafter the Council decided not to assist me in a legal challenge to the determinations.

5. In September, 1986, I filed a complaint pro se against Rutgers challenging its determination of the First Article IX Grievances in the Southern District of New York court. A true copy of such complaint is attached to Rutgers's brief submitted in support of its motions in this action as Addendum A. Because New York law did not permit service by certified mail, service was made under FRCP 4(c)(2)(C)(ii) upon David Scott, University Counsel, by regular mail, employing a Form 18-A prepared by the Southern District for such occasions. A true copy of this affirmation of service, dated December 6, 1986, is attached hereto as Exhibit C-1.

6. In the Southern District action Rutgers, represented by Linda Celauro, Esq. of the Newark firm of Carpenter, Bennett & Morrissey, sought dismissal of

the complaint inter alia for lack of personal jurisdiction, and I responded with a cross-motion to transfer the Southern District proceeding to the District Court in New Jersey if the court found jurisdiction proper but venue incorrect. A true copy of the cover of my brief and the pages containing my reference to my arguments to transfer are attached hereto as Exhibit D, and the cover page and relevant pages from the reply brief by Linda Celauro are attached hereto as Exhibit D-1. The complaint was dismissed and the cross-motion for transfer denied sub silentio. A true copy of the decision finally dismissing the complaint with no mention of the motion to transfer is attached to Rutgers's brief in support of their motions made in the instant action as Addendum D. I informed the Council of the results of the Southern District proceedings.

7. Meanwhile, in or about June, 1986, incorrectly and wrongfully decided not to renew my teaching contract as promised and, with the advice of the Council, it filed

on my behalf a new grievance with Rutgers challenging the decision not to renew ( the Article X Grievance ). In April, 1987, Rutgers attempted to frustrate the Article X Procedures, and in response thereto, at the suggestion and with the advice of the council, the Council challenged Rutgers' conduct on my behalf by bringing its actions before the Permanent Panel of Procedures ("PPP"). The Council informed R&S of this step and discussed the proceedings with them throughout. A true copy of a letter with notice of such proceedings dated September 1, 1987 and another dated September 10, 1987 are attached hereto as Exhibits E and E-1. The Council, however, acted grossly negligently and legally unsatisfactorily in representing me before the PPP and was so informed by me shortly thereafter. A representative of Rutgers sits on the PPP and thus Rutgers was thoroughly informed of the PPP proceedings and outcome.

8. In October, 1987, after the inadequate presentation of my position before the PPP by the Council, the PPP incorrectly and wrongfully concluded that there was nothing wrong with Rutgers' conduct in attempting to frustrate the Article X Grievance. I sought assistance for the Council in challenging the PPP decision in court. The Council considered my request and discussed it thoroughly with R&S and decided not to assist me by bringing a court challenge to the PPP decision. A true copy of a letter discussing this matter with notice of notification to R&S dated November 19, 1987 is attached hereto as Exhibit F, a true copy of a letter denying legal assistance with notice to R&S dated February 25, 1988 is attached hereto as Exhibit F-1, a true copy of a letter concerning litigation dated March 1, 1988 is attached hereto as Exhibit F-2, and a letter from R&S discussing this matter and informing me that no further union appeals were possible dated March 17, 1988 is attached hereto as Exhibit F-3. No notice was given by the Council to Foster that if he wished to pursue litigation on his own that he must do

so within 6 months of its letter to him of March 17, 1987.

9. In addition, in or about July, 1987, at the suggestion of and upon the advice of the Council, the Council filed additional grievances with Rutgers as a result of other conduct by its staff, the Second Article IX Grievances, and kept its counsel, R&S informed of these proceedings. A true copy of a letter discussing these grievances with notice thereof to R&S dated March 23, 1988 is attached hereto as Exhibit G and a second such letter dated March 29 is attached hereto as Exhibit G-1. On or about March 30, 1988 Rutgers rejected these grievances incorrectly and I sought the help of the Council in pursuing this matter in court, a request of which R&S received notice, but the Council refused to provide such help. A true copy of a letter referring to my request for legal help dated April 26, 1988 and a letter rejecting such request dated May 23, 1988 are attached as Exhibits G-2 and G-3 respectively; a copy thereof was sent not only to R&S,

it should be noted, but also to Judy Green, then President-elect of the Council, the person upon whom service against the Council was made in this action.

10. On August 24, 1988, as the six-month deadline for initiating legal action on my own under Federal labor law challenging the PPP decision approached, I filed the complaint in this action in the District Court of New Jersey in Newark, including therewith the claims raised against Rutgers in the Southern District proceeding challenging the rejection by Rutgers of the First Article IX Grievance, the claims arising out of the rejection by Rutgers of the Second Article IX Grievances, and some additional claims deriving therefrom or related thereto. On August 25, 1988, the clerk's office issued the summonses herein, which specify that I was a pro se plaintiff, and giving notice as to what each of the defendants herein were required to do upon receipt thereof, by when it must be done, and what would happen if they did not do so. A true copy of one of the summonses is attached hereto as Exhibit

H. No mention is made therein of a Form 18-A or of service under any federal service provision.

11. On or about August 23, I wrote to both R&S and the Council informing them that an action had been filed against the Council and asking if they would accept service of the summons and complaint therein by mail instead of by personal service. Each recipient responded, with copies of their replies sent to the other. R&S replied that it was not authorized to accept service on behalf of the Council, and the Council replied that service " can be made only in forms permissible by rules of the court ". A true copy of R&S's letter reply to me dated August 31, 1988 is attached hereto as Exhibit I and a true copy of the Council's reply to me dated September 9, 1988, together with my handwritten notes of certain conversations thereon, is attached hereto as Exhibits I-1. The letter from the Council was signed by Judy Green, the person upon whom service for the Council was later made.



12. On or about September 10, 1988, I sent a letter to Rutgers informing it that an action had been commenced naming it as a defendant and asking if it would accept service of the summons and complaint by mail instead of by personal service or if it would otherwise authorize its law firm to do so. This letter was received in the office of the President of Rutgers on September 14, 1988. A true copy of this letter with the date-stamp marking receipt is attached to the affidavit of David Scott submitted by Rutgers in support of its motion to dismiss as Exhibit 1 therein. Two days later, on September 16, Scott, University Counsel, replied to me that " Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under these rules ", asked that the summons and complaint be sent to him, and stated that he was asking the firm of Carpenter, Bennett & Morrissey to " continue to represent the University in this matter ". No mention is made in his letter of the federal service provision,

FRCP 4(c)(2)(C)(ii), or of form 18-A. A true copy of his letter to me dated September 16, 1988, together with my handwritten notes of certain conversations thereon, is attached hereto as Exhibit J.

13. Sometime, I believe shortly, after receipt of the Council's letter to me of September 9, 1988, I called the District Court Clerk's Office in Newark ( the "Clerk's Office" ). I explained that I was a pro se plaintiff in a case filed with the court and asked the person with whom I spoke, a clerk in the office, what type of service was permitted. The clerk informed me that service could be made by certified mail, return receipt requested. I noted this, together with other information, on the letter I had received from the Council dated September 9, 1988, true copy of which is attached hereto as Exhibited I-1. I also asked how long I had in which to do this, and was referred to one of Judge Sarokin's clerks, who told me that I had 120 days from the filing of the complaint; I noted this on the September 9 letter as well.

14. After attempting to locate an AAUP office in New Jersey without success, I called the AAUP office in Washington, D.C. in mid-September to ascertain whether it was a corporation or an association in order to ascertain the person upon whom service for the AAUP should be made.

15. Sometime after mid-September, 1988, I went to the library to check on whether certified mail service was permitted (it had not been permitted in the action started in the Southern District discussed above ) and to see to whom specifically such service ought to be addressed. I first found FRCP 4(c)(2)(C)(i) which referred me to service under state law service provisions, in this case New Jersey law, and I looked up New Jersey law on means of service and found that N.J. Civil Practice Rule 4:4-4 which authorized service by registered, certified, or ordinary mail if the party upon whom service is made answers or proceeds within 60 days, thus confirming what I had been told by the

clerk. I made note of this and of other matters upon a piece of notebook paper which I had taken to the library. A true copy of this page with my notes thereon is attached hereto as Exhibit K.

16. Sometime after visiting the library I tried to see if I could find an attorney knowledgeable in the field of labor law who might be able to assist me with this case; I was concerned about whether or not to add additional parties and if so how and when to do this. I spoke with Mr. Jeffery Glenn, Esq. of the firm of Kaplan, Russin who had been successful in obtaining an injunction prohibiting the termination of teaching contracts for three faculty members at CUNY. He told me that he would require a \$5,000 retainer to take on the case, estimated the total cost of the case, and explained to me that the only reason the CUNY case was financially viable was because there were three faculty members as plaintiffs in the same case; He informed me, however, that he would review my complaint and discuss it with me for \$200 per hour. I

noted down this information, together with other comments he made, on the letter dated September 16 which I had received from Rutgers, a true copy of which is attached hereto as Exhibit J. Since Rutgers had wrongfully renewed my contract I had been unable to obtain full-time employment and had been in fact had been living on unemployment compensation benefits since June, 1988. I felt, therefore, that I was unable even to afford the \$200 per hour consultation rate and thus unable to engage Mr. Glenn. I am still living on unemployment-compensation benefits and am still unable to afford the financial burden of obtaining legal counsel for this matter. In my conversation with Mr. Glenn I also raised the issue of service and under state law and he confirmed that this was a proper way to proceed. I noted on the September 16 letter from Rutgers " follow state practice for service ", as Exhibit J shows.

17. After speaking with Mr. Glenn I considered adding a new cause of action as well as new parties to the case,

and called the clerk's office for assistance with regard to the proper Procedures. I was told that if new parties were to be added, that I needed a new summons from the clerk's office within 120 days of the filing of the complaint. I noted this information on the sheet of notes I had made in the library, attached hereto as Exhibit K.

18. As the 120 -day deadline approached, I prepared to serve the summons and complaint by certified mail, as permitted under New Jersey law. I assumed that service of the summons and complaint would be made upon the mailing thereof, and thought it would be advisable to use certified mail since I would then have proof from the post office as to when the summons and complaint were actually served. I also thought it would be a good idea to have a return receipt to show that the summons and complaint were actually received in case some problem should arise. On Monday morning, December 19, 1988, I called the clerk's office to ask if service were used, whether Form-18A should be sent

with the summons and complaint, and if so what should be done about the discrepancy in the time in which to reply between the form and the summons for the AAUP, I made note of my questions as it took a few calls and some time to reach someone who could answer these questions in the clerk's office ( I made these notes, as I often do of phone conversations, on the back of a used envelope ). I finally spoke with a clerk, named Mary Fessel (?), explained that I was a pro se plaintiff in a case filed with the court, that I was about to serve a summons and complaint by certified mail, return receipt requested, and ask if I should submit an affirmation of service to the court. She said that I should and I noted this down. I then asked if I should send a Form-18A and, as I recall, she said not to worry about the discrepancy. I noted down that I should send the Form 18A. A true copy of the back of the envelope with my notes of the conversation and my notes of my questions is attached hereto as Exhibit L, and a true copy of my January phone bill showing calls

to the Clerk's Office on December 19, 1988 is attached hereto as Exhibit L-1.

19. With the information I had received from the Clerk's Office in hand, and in reliance thereon, I proceeded to type up an affirmation of service and prepare copies of Form 18-A. I took one of the forms of Form 18-A which I had left over from the action commenced in the Southern District, changed the name of the district at the top, typed in the caption an index number, went to the local copy shop, had copies of the affirmation, the summons and complaint, and of Form 18-A made. A true copy of the revised form 18-A is attached hereto as Exhibit M. Although, as I recall it, the clerk had said it would be alright to leave the discrepancy in the Form 18-A to sent to the AAUP, I felt uncomfortable with this because I had left such a discrepancy in the Form 18-A sent to Rutgers in the Southern District action, intending thereby to allow them 30 rather than 20 days in which to respond, but Rutgers counsel used this discrepancy to as a basis for



alleging they were confused and thus received insufficient service. A true copy of pages from Rutgers reply brief submitted by Linda Celauro, Esq. making these arguments is attached hereto as Exhibit M-1. I therefore whited-out the 20 days on one copy of the Form 18-A and inserted 35 days so that it would be consistent with the summons for the AAUP and I inserted the name of the AAUP thereon as the party to be served. A true copy of this copy of Form 18-A is attached to the affidavit of Alesia Pope submitted in support of the motions of the Council and AAUP. I then filled in the names of the other defendants on the other copies of Form 18-A. Because the form stated that the "summons and complaint accompanied by the form were being served" pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure, and at the time I had no idea whatsoever what that meant, I concluded that it was prudent not to sign the sworn statement or to date it as required by the form itself, and therefore left the place for "Signature" and "Date of Signature", as well as the space above for the

date of mailing of the form, blank on all the copies I had made. A true copy of the Form 18-A without my signature or dates sent to the AAUP is, as just noted, attached to the affidavit of Alesia Pope submitted in support of the motions of the Council and the AAUP. A true copy of the Form 18-A sent to Rutgers without my signature or dates is attached as Exhibit 4 to the affidavit of David Scott submitted in support of Rutgers' motion. A true copy of the Form 18-A sent to the Council without my signature or any dates is attached to the affidavit of Faye Schreier as part of Exhibit 1 thereto submitted in support of the motions of the Council and the AAUP. Only one such copy of Form 18-A was sent to each of the Defendants, and no self-addressed, postage prepaid envelope or any return envelope of any sort was included with the summons and complaint and single copy of the Form 18-A sent to each of the Defendants.

20. I then when to the post office, and placed within an envelope properly addressed to each of the

defendants, a copy of the appropriate summons, a copy of the complaint, and a copy of the appropriate Form 18-A. I filled out the proper forms to send each envelope by certified mail, return receipt requested, attached these forms to the envelope as directed, paid the proper postage for each envelope, sealed the envelopes, and gave each to the clerk at the post office window to whom I paid the postage. The clerk stamped the date of December 19, 1988 on each of the certified mail receipts: number P 826 696 984 for the envelope sent to Davis Scott, University Counsel, 105 Geology Hall, Rutgers University, New Brunswick NJ for defendant Rutgers; number P 826 696 979 for the envelope addressed to Judy Green, Pres., Building 4103 Kilmer Campus, Rutgers University, New Brunswick, NJ for the defendant Council; and number P 826 696 977 for that sent to the President, AAUP, 1012 14th Street, N.W. Washington, D.C. A true copy of each these receipts is attached hereto as Exhibit N. My recollection is that I also asked the clerk to cancel the stamps with the date-stamp and that he did this,

stamping them December 19, 1988. The clerk, also stamped each envelope " CERTIFIED MAIL Return Receipt Requested ". A true copy of one envelope is attached to the Affidavit of Alesia Pope submitted by AAUP.

21. Prior to going to the copy shop I typed up an affirmation of service stating only that " a copy of the summons and a copy of the Complaint herein were duly served on each of the present Defendants herein " and after mailing the envelopes to the defendants as just described, I signed and then mailed the original of the affirmation to the Clerk's Office in Newark. It was filed in the Clerk's Office on December 23, 1988. A true copy of the filed original affirmation of service is attached to the affidavit of David Scott submitted in support of the Rutgers motion as Exhibit 3 thereto.

22. The United States Postal Service Direct Mail Manual, Rules 912.5 and 911.4 establish certified mail delivery Procedures and these Procedures authorize

delivery of certified mail only to " the addressee or his authorized representative ", require identification of the person to whom delivery is being made if such person is unknown to the deliverer, and require the signature of the person receiving such mail. A true copy of pages 483 and 479 of the current edition of such manual containing such rules is attached hereto as Exhibit O. The supervisor of Window Services at the New Brunswick Post Office informed me that if delivery is made at a post office, a form authorizing a recipient other than the addressee to accept delivery on behalf of the addressee must be on file in that post office before delivery can be made to any such person. I spoke with Mr. the Supervisor, Mr. Hutmacher, on January 25, 1989 when he told me above information.

23. Mr. Gene Hutmacher, Supervisor of Window Services at the New Brunswick Post Office also informed me on January 25, 1989, that the envelope addressed to David Scott was accepted by Mr. Russel Smith a person duly authorized to accept mail for

David Scott as University Counsel on David Scott's behalf at the New Brunswick Post Office on December 21, 1988 and that a form authorizing Mr. Smith to make such acceptance had been on file at the post office for some time. The return receipt attached to the envelope addressed to David Scott, University Counsel, is initialed with what appears to be the letter " R ", evidently Mr. Smith's initial, and stamp dated " Dec 21 1988 ". The front side of this form indicates that it too was mailed back to me on December 21, 1988. A true copy of the front and back of the return receipt attached to the envelope mailed to Judy Green, President, is attached hereto as Exhibit Q. I received this receipt shortly after December 21, 1988.

25. On or about January 30, 1989 I spoke with Mrs. King, a clerk at delivery services of the Washington D.C. post office which or rather from which the envelope addressed to the President, AAUP was delivered and she informed me that a certified letter so addressed would not have been delivered to someone

who was not authorized to accept such delivery on behalf of the President, and further that if such an envelope also had a return receipt request form on it that the person accepting delivery would be asked to sign the return receipt. I explained that the person accepting delivery had not signed and returned the receipt, and she said she would attempt to find out what happened. I gave her the certified receipt number and she said she would speak with the supervisor about it. I called several days later and was told by her that the supervisor could find no trace of the letter, but that he would continue to look for information as to what had happened. I was also told to make a formal request through my local post office. I spoke with a clerk at my local post office, who told me I would have to come and fill out a form at the post office and that it would take a few weeks to have an answer. Prior to serving or filing this affirmation such a request will be made, but it is most doubtful that a response can be had before the February 27, 1980 return date.

26. After receiving a copy of the Form 18-A sent to Scott purportedly signed by him on December 23, 1988, I put such copy in my file for safe keeping along with the return receipts, and did not file such copy or any copy thereof with the court. None of the other defendants returned to me a copy of the Form 18-A received by them nor did I file any copies of any Form 18-A at all with the court.

27. Prior to receipt of their motion papers, none of the Defendants and neither of their counsel contacted or even attempted to contact me with regard to service of the summons and complaint or any other matter, in any way whatsoever.

28. On January 9, a copy of the papers served on my by Linda Celauro, Esq. counsel for Rutgers, was sent to R&S, counsel for the Council and the AAUP, and on January 18, 1989, R&S, counsel for the Council and the AAUP sent copies of the papers they served on me



to Linda Celauro, counsel for Rutgers. A true copy of a letter dated January 9, 1989 attesting to Celauro sending copies to R&S is attached hereto as Exhibit and a copy attesting to R&S sending copies to Celauro dated January 18, 1989 is attached hereto as Exhibit R-1.

29. As of the typing hereof arrangements are being made for personal service on Rutgers and the Council within 60 days of the mailing of the summonses to them, and such arrangements will be made with regard to the AAUP if such service is not too costly for me to afford.

30. The allegation by David Scott made in his affidavit in support of Rutgers' motion that the summons and complaint "were not served " ( emphasis in the original ) on Rutgers on December 19, 1988 is false.

31. The " litigation experience " mentioned in my resume submitted to Rutgers in 1984 was de minimus.

The equal opportunity matter consisted of digesting cases to ascertain important facts and occurred in 1973 or 1979 and took at most a few days. The landlord-tenant matters are pro se matters which, regrettably, continue to this day as a result of problems between myself and my landlord. The breach of contract probably refers to one matter in which I represented a client while in private practice. None of these matters involved questions of service under federal or New Jersey law and none involved the Third Circuit's interpretations of these provisions. As the cover letter accompanying the resume states, I had considerable experience " in corporate law, a background in international law, and, in an unrelated area, some teaching experience ". A true copy of this letter is attached as Exhibit A to the Brief filed by Rutgers in the motion sub judice.

32. During my interviews at Rutgers I informed them that I was a corporate attorney, and as the university regulations prohibited maintaining an outside practice

and I completed forms attesting to adherence with the rules, they must have known that I was a teacher and not a practicing attorney. Linda Celauro, who also represented Rutgers in the Southern District obviously must have known that I was a teacher in the business school there, for so the brief she submitted in that action states, and therefore that I was not a practicing attorney. A true copy of a page of that brief so stating is attached hereto as Exhibit S. The Council, which represented me as a teacher at the school obviously knew I was a teacher and not a practicing attorney. And the fact that I was a teacher and not a practicing attorney was communicated by the council to R&S and by me to them as well in various conversations had between the Council and R&S and between myself and R&S. There can be not question but that Rutgers and the Council and counsel for Rutgers and the Council and AAUP each knew that I was a corporate attorney who had gone into teaching and not either a litigator or practicing attorney when they filed the briefs for the motions now before the court.

33. The allegations made in the Complaint filed with the court on August 24, 1988 in this action are hereby incorporated herein as if fully set forth here.

Dated: February 9, 1989

---

Philip E.  
Foster,  
Esq.

Sept. 10, 1988

Dear Sir or Madam:

Re: Foster v. Rutgers et al.

This is to inform you that Rutgers is a defendant in the above-captioned matter and to ask if you would accept service of the summons and complaint therein by mail, or authorize your law firm to accept such service by mail, saving me a trip to New Brunswick.

Thank you for your attention.

Yours,

P. Foster

23 East 81st St

170

Case No. A-362

NYC NY 10028

212-988-3306

Exhibit 1

---

THE STATE UNIVERSITY OF NEW JERSEY  
RUTGERS

---

Office of University Counsel. New Brunswick. New  
Jersey 08903.201/932-7697

September 16, 1988

Mr. Philip Foster  
23 East 81st Street  
New York, New York 10028

Re: Philip E. Foster v. Rutgers, The State University,  
et al.

Dear Mr. Foster:

Your letter dated September 10, 1988 has been referred to me for response. Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under

those rules. Please send the summons and complaint to me, David R. Scott, University Counsel, Office of University Counsel, Geology Hall, Room 105, New Brunswick, New Jersey 08903. For your information, I am asking the law firm of Carpenter, Bennett & Morrissey in Newark, New Jersey to continue to represent the University in this matter.

Sincerely,  
David R. Scott  
University  
Counsel

cc: Linda B. Celauro, Esq.



---

THE STATE UNIVERSITY OF NEW JERSEY  
RUTGERS

---

Office of University Counsel. New Brunswick. New  
Jersey 08903.201/932-7697

September 16, 1988

Mr. Philip Foster  
23 East 81st Street  
New York, New York 10028

Re: Philip E. Foster v. Rutgers, The State University,  
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Dear Mr. Foster:

Your letter dated September 10, 1988 has been referred to me for response. Since the applicable federal rules of civil procedure call for accepting

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---

(XIth - brought control  
XIVth - state or public action  
- \$200 hr. to review  
Mount Healthy case)

Sincerely,  
David R. Scott  
University  
Counsel

(breach of  
contract)

cc: Linda B. Celauro, Esq.

(claim of reasonable contract expectations !!!)

(3 copies needed of complt)

(Union claim - 301)

(follow state practice for service)

(procedure-bad faith

secretary)

(must win procedural to get to merits)

Law Offices  
REINHARDT & SCHACHTER, P.C.  
744 Broad Street . Suite 3100  
NEWARK, NEW JERSEY 07102  
201/623-1600

August 31, 1988

Mr. Philip Foster  
23 East 81st Street  
New York, New York 10028

Re: Your Letter Dated August 25, 1988 (Postmarked  
August 29, 1988)

Dear Mr. Foster:

Please be advised that this office is not  
authorized to accept service of process or complaints  
on behalf of the Rutgers Council of AAUP Chapters.

Case No. A-362

177

Very truly

- yours,

REINHARDT

&

SCHACHTER,

P.C.

Paul Schachter

ps:lm

cc: AAUP

Exhibit I

AAUP American Association of University

Professors

bldg. 4103, Kilmer campus. Rutgers, The State

University, New Brunswick, N.J. 08903 (201) 932-

2278/9

RUTGERS COUNCIL OF AAUP CHAPTERS

September 9,

1988

Mr. Philip Foster

23 East 81st Street

New York, New York 10028

Dear Mr. Foster:

Service on the Rutgers Council of AAUP

Chapters can be made only in forms permissible by  
rules of the court in which you filed your complaint.

Sincerely yours,  
Judy Green  
President

cc: Judy Goldberg  
Wells H. Keddie  
Reinhardt & Schachter, P.C.

---

( - serve by certified mail return receipt requested )  
( - in fed. rules of CP )  
(over 18 & unrelated to case!)

---

(Dist Ct. Newark 201-645-3730 (?) )  
(\$5 - for copy local rules-)  
(Clerk US Dist Ct.  
US Courthouse

180

Case No. A-362

Box 419

Newark 07102)

(-summons & complaint)

(Sarokin - Dist Clerk      120 days)

Exhibit I-1



(1.service by certified mail (?))

Parties - 1) Rutgers-IBA:65:63

2) Rutgers Council of AAUP)

(65-2-instead of state for  
purposes of operating  
state university)

(add

Wells Keddie individually & others?

(3)PPP

(so, members of PPP!)

(+State law claim

against union))

(4)AAUP)

([missing] add

R Council Pres.?)

(Service - NJ 2A:64-2-unincorp asocs)

(service on president or other  
officer or . . . person in charge of  
the business org or association)

(4:4-4 - by registered, certified or  
ordinary if answer w/i 60 days!)

(Changes - if new parties - SL? - need new  
summons w/i 120 days)

(20 days)

(if no new parties, new file & serve first  
amended complaint)

([missing] F Supp 1306 R v. Miller - XIth Amend)

([missing] F2d 1303 - Kovats v. Rutgers! (682 FS 213)

)

Maybe serve and file amended  
no new parties

then on Fri see if need[?] amended? )

Exhibit K

[[illegible] and complaint)

(Mary Fessel)

(clerk)

[[illegible]]

(Questions)

(1) information of service?)

\_\_\_\_\_(Yes)

(2) Form 18-A ?)

(35 - 20)

(yes)

Exhibit L

AT&amp;T

Account Number: 212

988-3306 768 732

January 16, 1989

Page 1

Last page

[missing]tion of your bill is provided as a service to AT&T. There is no connection between [missing]k Telephone and AT&T. You may choose another company for your long distance [phon]e calls while still receiving your local telephone service form New York Telephone.

[missing]l numbers

[I]nquiries call AT&T 1 800 222-0300

[Summ]ary of AT&T charges

---

[missing] calls . . . . . \$4.03

[missing]s receipts tax surcharges .08

Federal Tax (3%) .12

Total            \$4.23

[missing]ed calls

---

[missing]ly dialed

<u>Date.Place called. Number called</u>			<u>Time</u>
<u>Rate</u>	<u>min.</u>	<u>Amount</u>	
Dec 19	Newark NJ	201 645-3730	10 24
AM	DAY	2 \$.42	
Dec 19	Newark NJ	201 645-3730	10 31
AM	DAY	1 \$.25	
Dec 19	Newark NJ	201 645-3730	10 31
AM	DAY	1 \$.25	
Dec 19	Newark NJ	201 645-3730	10 43
AM	DAY	5 \$.93	
Dec 20	Newark NJ	201 645-4552	11 08
AM	DAY	2 \$.42	
Dec 20	Montcl NJ	201 783-8659	7 08 PM
EVE	1 \$.16		
Dec 22	BridgeP CT	203 576-4869	10 32
AM	DAY	1 \$.27	

Case No. A-362

187

Dec 28	Trenton NJ	609 984-1677	10 59
AM	DAY	2 \$.48	
Jan 10	Nw Lond CT	203 443-5378	6 17 PM
EVE	2 \$.31		
Jan 11	Nw Lond CT	203 443-5378	2 27 PM
DAY	1 \$.27		
Jan 11	Blomfld CT	203 242-2917	2 29 PM
DAY	1 \$.27		

Total                   \$4.03

Exhibit L-1

UNITED STATES DISTRICT COURT  
NEWARK, NEW JERSEY

---

PHILIP E. FOSTER,

Plaintiff

Index No.

88-3692(HLS)

v.

AFFIRMATIO

N

OF

SERVICE

RUTGERS, THE STATE UNIVERSITY

et. al.,,

Defendants

---

Philip Foster, an attorney duly admitted to the practice of law in the State of New York, affirms that a copy of the Summons in the State of New York, affirms that a copy of the Summons and a copy of the Complaint



herein were duly served on each of the present  
Defendants herein on Dec. 19, 1988. So affirmed.

Philip E.  
Foster, Esq.

[stamped]  
FILED  
DEC 23 1988  
AT 8:30 .....  
WILLIAM T.  
WALSH  
CLERK  
(slw)

PS Form 3800, June 1985

P 826 696 977

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

---

Sent to (Pres, AAUP)

Street and No ( 1012 14th St Wash DC)

P.O. State and Zip Code

Postage \$(65)

Certified Fee (85)

Special Delivery Fee

: Restricted Delivery Fee

Return Receipt showing

to whom and Date Delivered (90)

Return Receipt showing to whom,

Date and Address of Delivery

TOTAL Postage and Fee \$(2.40)

[stamped] NEW YORK [illegible]

DEC 19 1988

---

PS Form 3800, June 1985

P 826 696 979

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

---

Sent to (Judy Green, Pres.)

Street and No ( Bldg 4103 Kilmer)

P.O. State and Zip Code New Brunswick NJ)

Postage \$(85)

Certified Fee (85)

Special Delivery Fee

Restricted Delivery Fee

Return Receipt showing

to whom and Date Delivered (90)

Return Receipt showing to whom,

TOTAL Postage and Fee \$(2.60)

DEC 19 1988

(See Reverse)

### Special Delivery Fee

Restricted Delivery Fee

Return Receipt showing

to whom and Date Delivered ( 90)

Return Receipt showing to whom,

Date and Address of Delivery

TOTAL Postage and Fee \$(2.60)

[stamped] NEW YORK ( illegible)

DEC 19 1988

---

---

SENDER: Complete items 1 and 2 when additional services are desired and complete items 3 and 4.

Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. Show to whom delivered, date, and addressee's address.
2. Restricted Delivery (Extra charge)
3. Article Addressed to:

(David Scott, Univ. Counsel  
Rm 105, Geology Hall  
Rutgers Univ.  
New Brunswick NJ)

4. Article Number ( P 826 696 984)

Type of Service

Registered                      Insured  
(X)Certified                      COD  
Express Mail

Always obtain signature of addressee or agent and  
DATE DELIVERED.

5. Signature - Addressee

X

6. Signature - Agent

X      (R)

7. Date of Delivery

[stamped] Dec 21 1988

8. Addressee's Address (ONLY if requested and fee  
paid)

PS Form 3811, Mar. 1987 \* U.S.G.P.O. 1987-178-268

DOMESTIC RETURN RECEIPT

## UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS

[stamped] ALWAYS

USE YOUR ZIP CODE

[(stamped)] ( illegible ) PM Dec 21 1988 08899

KILMER GMF NJ

U.S. Mail Penalty for Private Use, \$300

## SENDER INSTRUCTIONS

Print your name, address, and Zip code in the space below.

- Complete items 1,2,3, and 4 on the reverse.
- Attach to front of article if space permits otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

RETURN TO

Print Sender's name,

address, and ZIP Code in the space below.

( P. Foster

23 E 81

NYC 10028)

Exhibit P



SENDER: Complete items 1 and 2 when additional services are desired and complete items 3 and 4.

Put your address in the " RETURN TO " Space on the reverse side. Failure to do so will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. Show to whom delivered , date, and addressee's address.

2. Restricted Delivery (Extra charge)

3. Article Addressed to:

(Judy Green, Pres.

Rutgers Council

Bldg. 45103 - Kilmer

Rutgers Univ.

New Brunswick NJ)

4. Article No. (P 826 696 979)

Type of Service

198

Case No. A-362

Registered Insured

(x) Certified COD

Express Mail

Always Obtain Signature of addressee or agent and

DATE DELIVERED.

5. Signature - Addressee

X

6. Signature - Agent

X (R)

7. Date for Delivery

[stamped] DEC 21 1988

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Mar. 1987 \*U.S.G.P.O. 1987-178-268

DOMESTIC RETURN RECEIPT

UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS [stamped] ALWAYS USE  
YOUR ZIP CODE

[stamped] PM DEC 21 1988 KILMER GMP NJ

[illegible]

U.S. Mail Penalty for Private Use, \$300

**SENDER INSTRUCTIONS**

Print your name, address, and Zip code in the space below.

- Complete items 1,2,3 and 4 on reverse.
- Attach to front of article if space permits otherwise affix to back of article.
- Endorse article " Return Receipt Requested" adjacent to number.

**RETURN TO**      Print Sender's name, address, and  
ZIP Code in the space below.

(p. Foster

23 E 81

NYC 10028)

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

---

Philip E. Foster,

Plaintiff

NOTICE AND

ACKNOWLEDGEM

ENT

-against-

OF RECEIPT OF

Rutgers, The State

SUMMONS AND

University et.al.,

COMPLAINT

Defendants 88Civ.3692(HLS)

Docket Number and

Judge's Initials

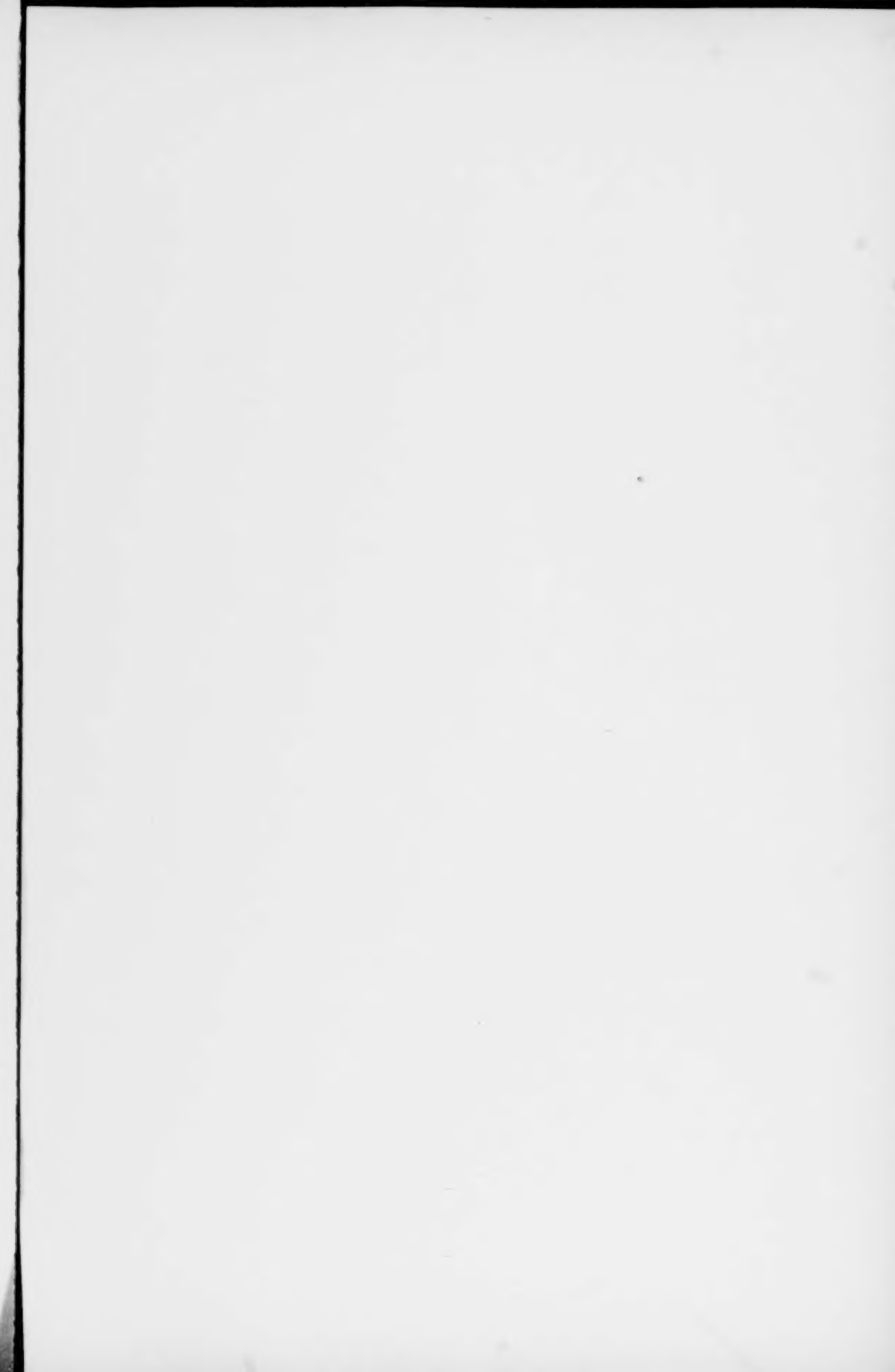
---

To [ insert name and address of party to be served]

( David R. Scott, Univ. Counsel

for Rutgers, The State Univ.)

The enclosed summons and complaint are  
served pursuant to Rule 4(c)(2)(C)(ii) of the Federal  
Rules of Civil Procedure.





University Counsel/Service accepted on behalf of

Rutgers, The State University [illegible]

Relationship to Entity/Authority to Receive Service of  
Process

SDNY Form 18-A (rec. 8/85)-

CARPENTER, BENNET & MORRISEY

Three Gateway Center

100 Mulberry Street

Newark, NJ 07102

(201) 622-7711

Attorneys for Defendant

Rutgers, The State University

UNITED STATES

DISTRICT

COURT

DISTRICT OF NEW

JERSEY

Philip E. Foster,

Plaintiff

: HONORABLE H. LEE

v.

SAROKIN

Rutgers, The State

University; The Rutgers

Council of the American:

Association of University

Professors; The Permanent

Panel on Procedures; and

the American Association

AFFIDAVIT OF

DAVID R.

SCOTT IN

SUPPORT OF



of University Professors,

DEFENDANT

Joint and Several

RUTGERS, THE

Defendants.

STATE UNI-

VERSITY'S

MOTION TO

DISMISS

COMPLAINT

---

STATE OF NEW JERSEY :

COUNTY OF MIDDLESEX: SS.:

David R. Scott, of full age , being duly sworn according to law, upon his oath deposes and says:

1. I am employed by Rutgers, The State University of New Jersey ("Rutgers"), in the position of University Counsel.

2. I make this affidavit in support of Rutgers' motion to dismiss the Complaint.

3. A letter by plaintiff, Philip E. Foster, dated September 10, 1988 and received by me on September 14, 1988, was referred to me for response. A true copy of said letter is attached hereto as EXHIBIT 1.

Therein, plaintiff Foster asked if Rutgers would accept service by mail of a summons and complaint in an action identified only as " Foster v. Rutgers, et al. "

4. By my letter dated September 16, 1988, I advised plaintiff Foster: " Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under those rules ." A true copy of said letter is attached hereto as EXHIBIT 2.

5. Plaintiff Foster did not mail the Summons and Complaint to Rutgers until late December, 1988, immediately prior to the time period during which both the academic and administrative offices of Rutgers are closed for the holidays.

6. I have reviewed a copy of the " Affirmation of Service " which the plaintiff filed with the Clerk of this Court on December 23, 1988. A copy thereof is attached hereto as EXHIBIT 3. Contrary to plaintiff Foster's affirmation, the Summons and Complaint were not served upon Rutgers on December 19, 1988.

7. On December 23, 1988, on behalf of Rutgers, I signed the " Notice and Acknowledgement of Receipt of Summons and Complaint " form which had been enclosed with the Summons and Complaint mailed to Rutgers. A true copy thereof is attached hereto as EXHIBIT 4.

(David R. Scott)

DAVID R. SCOTT

Sworn and Subscribed to  
before me this (6th) day  
of January , 1989.

(Maria E. DiPina)

MARIA E. DePINA

NOTARY PUBLIC OF NEW JERSEY

My Commission expires Aug. 30,1990

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

-----

Philip E. Foster,

CIVIL ACTION NO.

plaintiff

ACKNOWLEDGEM

ENT

vs.

OF SERVICE

Rutgers, The State

University Et al.,

Joint and

Several Defendants

---

The undersigned hereby acknowledges receipt  
of a copy of the summons and complaint in the above-  
captioned matter on February ,1989 on behalf of

So acknowledged.

(Sign.) (Gail B. Heseltine)

(Print) (GAIL B. HESELTINE)

(for David R. Scott)

Dated: February (10), 1989

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

-----  
Philip E. Foster,

CIVIL ACTION NO.

plaintiff

88-3692 (HLS)

vs.

ACKNOWLEDGEM

ENT

Rutgers, The State

OF SERVICE

University, et al.,

Joint and Several

Defendants

---

The undersigned hereby acknowledges receipt  
of a copy of the summons and complaint in the above-  
captioned matter on February (10), 1989 on behalf of  
(Rutgers Council of AAUP Chapters)

So acknowledged.

(Sign) (Judy Green)

(Print) (JUDY GREEN)

Dated: February (10), 1989

Philip E. Foster  
Petitioner Pro Se  
23 East 81st Street  
New York, N.Y. 10028  
(212) 988-3306

2

No. 91-1082

Supreme Court, U.S.

FILED

FEB 4 1992

CLERK OF THE CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1991

PHILIP E. FOSTER,

*Petitioner,*

VS.

RUTGERS, THE STATE UNIVERSITY, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

**BRIEF IN OPPOSITION OF RESPONDENT  
RUTGERS, THE STATE UNIVERSITY**

LINDA B. CELAURO

*Counsel of Record*

DAVID J. REILLY

CARPENTER, BENNETT & MORRISSEY

*Attorneys for Respondent*

*Rutgers, The State University*

Three Gateway Center

100 Mulberry Street

Newark, New Jersey 07102-4082

(201) 622-7711

February 1992





## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the courts below correctly determine that petitioner failed to serve respondents with a copy of the summons and complaint within 120 days of filing as required by Fed. R. Civ. P. 4(j)?
2. Did the courts below correctly determine that petitioner did not establish "good cause" for his failure to comply with the 120-day time limit of Fed. R. Civ. P. 4(j)?
3. Did the courts below correctly determine there was no basis for the award of sanctions against respondents under Fed. R. Civ. P. 11?

## LIST OF PARTIES TO THIS PROCEEDING\*

Petitioner:

Philip E. Foster

Respondents:

Rutgers, The State University

The Rutgers Council of the American Association  
of University Professors

The American Association of University  
Professors

---

\* The Permanent Panel on Procedures was a party defendant in the United States District Court for the District of New Jersey, but was not an appellee in the United States Court of Appeals for the Third Circuit, nor is it a respondent herein.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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PHILIP E. FOSTER,

*Petitioner,*

vs.

RUTGERS, THE STATE UNIVERSITY, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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**BRIEF IN OPPOSITION OF RESPONDENT  
RUTGERS, THE STATE UNIVERSITY**

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Respondent Rutgers, The State University, respectfully requests that this Court deny the petition for a writ of certiorari. The merits of petitioner's claims in this action have been rendered moot as to Rutgers because a subsequent action he filed against respondents, containing virtually identical claims, has been dismissed with prejudice as to Rutgers. Further, the petition raises no "special and important reasons" for granting a writ of certiorari, but merely seeks review of correct applications of the plain language of the Federal Rules of Civil Procedure to the particular facts of this case.

## STATEMENT OF THE CASE

## A. Proceedings Below

This is the second in a trilogy of virtually identical actions brought by the petitioner, *pro se* attorney Philip E. Foster ("Foster"), against respondent Rutgers, The State University ("Rutgers").<sup>1</sup> Foster filed the complaint in this matter on August 24, 1988 against respondents and the Permanent Panel on Procedures (Pet. App. 99-137; Ja3).<sup>2</sup> Foster had been employed as an untenured faculty member in Rutgers' Graduate School of Management, pursuant to a three-year term contract (1984 to

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<sup>1</sup> The first action, *Foster v. Rutgers, et al.*, No. 86 Civ. 6765 (S.D.N.Y., filed Sept. 2, 1986) ("*Foster I*"), was dismissed, on February 2, 1987, on the bases of improper process, improper service of process, improper venue, lack of personal jurisdiction, and lack of subject matter jurisdiction under 28 U.S.C. §1332. *Foster v. Rutgers, et al.*, No. 86 Civ. 6765 (S.D.N.Y. Feb. 2, 1987). The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court. *Foster v. Rutgers, et al.*, No. 87-7470 (2d Cir. Dec. 2, 1987).

Foster filed the third action, *Foster v. Rutgers, et al.*, Civil Action No. 90-2490 AJL (D.N.J., filed June 25, 1990) ("*Foster III*"), after the Third Circuit affirmed the district court's dismissal of the instant action. The *Foster III* complaint contains virtually identical allegations against the same parties as the instant action, except that the Permanent Panel on Procedures, which was a defendant in this proceeding before the district court, was omitted as a party. *Foster III* was dismissed with prejudice as to Rutgers, on August 20, 1991, on the basis of Foster's repeated refusals to comply with discovery orders. *Foster v. Rutgers, et al.*, Civ. No. 90-2490 AJL (D.N.J. Aug. 20, 1991). In addition, five of the six counts of the *Foster III* complaint have been dismissed with prejudice as to the Rutgers Council of American Association of University Professors ("Rutgers Council") and the American Association of University Professors ("AAUP"). Rutgers Council and the AAUP have moved to dismiss the remainder of *Foster III* with prejudice, due to Foster's failure to comply with court-ordered discovery deadlines. Those motions currently are pending before the district court.

<sup>2</sup> "Pet. App." refers to the Appendix to Foster's Petition.

"Ja" refers to the "Joint Appendix" filed with the United States Court of Appeals for the Third Circuit.

1987), which was not renewed (Pet. App. 103, ¶8; Pet. App. 113-114, ¶42). Foster's complaint alleges improprieties in the non-renewal of his term employment contract and in the handling of various grievances relating to his employment (Pet. App. 99-137).

On January 9, 1989, Rutgers filed a motion in lieu of answer, pursuant to Fed. R. Civ. P. 12(b)(2), (4), and (5), for dismissal of Foster's complaint on the basis that he, without good cause, failed to effect service of the Complaint upon Rutgers within 120 days after the filing of the Complaint as required by Fed. R. Civ. P. 4(j) (Ja21-22). Rutgers Council of the American Association of University Professors and the American Association of University Professors also moved for dismissal of Foster's complaint on the same basis (Ja3).

Foster filed cross-motions "for an Order declaring the service of Form 18-A<sup>3</sup> null and void, authorizing the holding of an evidentiary hearing, deferring decision on the motion of the AAUP, enlarging the time in which to make service, and imposing sanctions on the defendants herein and their counsel" (Ja73). By an Order entered on the docket May 3, 1989, the district court denied Foster's cross-motions and granted defendants' motions to dismiss Foster's Complaint without prejudice, pursuant to Fed. R. Civ. P. 4(j), for the reasons set forth in its Opinion dated May 3, 1989 (Pet. App. 66-81).

Foster then filed what he termed a motion "pursuant to Fed. R. Civ. P. 59 amending or altering the Court's Order of May 3, 1989. . ." (Ja156). The district court received Foster's motion on May 19, 1989 — two days after the ten-day period for filing such a motion had expired, pursuant to Fed. R. Civ. P. 59 and General Rule 121 of the United States District Court for the District of New Jersey (Pet. App. 88). The district court nevertheless considered Foster's motion pursuant to Fed. R. Civ. P. 60(b) (Pet. App. 88). By Memorandum Opinion and Order entered on the

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<sup>3</sup> Form 18-A is the "Notice and Acknowledgment for Service by Mail" form prescribed for federal service by mail under Fed. R. Civ. P. 4(c)(2)(C)(ii).

docket January 19, 1990, the district court denied Foster's motion\* (Pet. App. 82-92).

Foster appealed to the United States Court of Appeals for the Third Circuit from the May 3, 1989 Order of the district court dismissing his Complaint as to Rutgers, Rutgers Council and the AAUP, and denying his cross-motions, and from that portion of the January 19, 1990 Memorandum Opinion and Order denying his motion for reconsideration (Ja1). By Judgment Order dated July 24, 1990, the Third Circuit affirmed the judgment of the district court (Pet. App. 62-64). Foster's petition for rehearing was denied on August 21, 1990 (Pet. App. 95-96).

## B. Facts

Although appearing *pro se*, Foster is "an attorney duly admitted to the practice of law in the State of New York" (Pet. App. 188). He graduated from law school in 1977, and admits to having engaged in the practice of law from 1978 through 1984 (Pet. App. 139-140, ¶2).

Foster filed the complaint in this matter on August 24, 1988 (Ja3; Pet. App. 99-137).

By his letter dated September 10, 1988, Foster asked if Rutgers would accept service by mail of a summons and complaint in an action identified only as "Foster v. Rutgers, et al." (Ja25, ¶3; Ja27). By letter dated September 16, 1988, Rutgers' University Counsel advised Foster: "Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under those rules" (Ja24, ¶1; Ja25, ¶4; Ja28).

Foster asserted that, shortly after September 9, 1988, "[t]he clerk informed me that service could be made by certified mail,"

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\* By the same Memorandum Opinion and Order, the district court dismissed the Complaint with prejudice as to the Permanent Panel on Procedures on the basis of absolute arbitral immunity (Pet. App. 84-87). Foster, however, did not appeal that portion of the district court's Order to the Third Circuit (Ja1) and the Permanent Panel on Procedures is not a respondent herein.

and that a district judge's clerk told him that service of a complaint had to be made within 120 days of its filing (Pet. App. 150, ¶13). He also asserted that, sometime after mid-September, 1988, he performed some legal research regarding permissible methods of service of process, contacted one attorney regarding adding parties and permissible methods of service, and called the district court clerk's office regarding adding parties and claims. (Pet. App. 151-154, ¶¶15, 16, 17).

Foster never explained to the courts below what he did with the rest of his time between mid-September, 1988 and December 19, 1988, although he did certify that he was not otherwise gainfully employed: "I had been unable to obtain full-time employment and had been in fact living on unemployment compensation benefits since June, 1988" (Pet. App. 153, ¶16).

Foster asserted that "[a]s the 120-day deadline approached, I prepared to serve the summons and complaint by certified mail. . . ." (Pet. App. 154-156, ¶18). Foster further asserted that, on December 19, 1988, a clerk confirmed that he should use a Form 18-A for service by mail and that he needed to file proof of service (Pet. App. 154-156, ¶18). By his own account, on December 19, 1988 — 117 days after filing the complaint — Foster inserted the summons, complaint and a Form 18-A in an envelope addressed to Rutgers' University Counsel and brought it to the post office for mailing by certified mail, return receipt requested (Pet. App. 156-160, ¶¶19-20).

On December 23, 1988, on behalf of Rutgers, Rutgers' University Counsel signed the Form 18-A which had been enclosed with the summons and complaint mailed to Rutgers (Ja26, ¶7; Ja30). Foster admitted that he received the signed Form 18-A but did not bother to file it (Pet. App. 164, ¶26). Instead, Foster filed a conclusory "Affirmation of Service" with the court below, which stated:

Philip Foster, an attorney duly admitted to the practice of law in the State of New York, affirms that a copy of the Summons and a copy of the Complaint

herein were duly served on each of the present Defendants herein on Dec. 19, 1988. So affirmed.

/s/ Philip E. Foster  
Philip E. Foster, Esq.

(Ja29). Foster's affirmation notwithstanding, service was effected, whether under federal or state service by mail rules, upon defendant Rutgers no earlier than December 23, 1988 — the date on which Rutgers' University Counsel signed and returned Form 18-A — after the expiration of the 120-day period for service of the Summons and Complaint under Fed. R. Civ. P. 4(j).

### REASONS FOR DENYING THE WRIT

#### A. This Action Is Moot as to Rutgers Because Foster's Subsequent Identical Action Against Rutgers Has Been Dismissed with Prejudice.

After the Third Circuit affirmed the dismissal of Foster's complaint in this action, Foster filed and served another complaint against respondents containing claims and factual allegations virtually identical to those in this action. That action, *Foster III*, has been dismissed with prejudice as to Rutgers, because Foster repeatedly refused to comply with the district court's discovery orders (*See* note 1, *supra*). Therefore, the instant action is moot as to Rutgers, because the dismissal with prejudice of *Foster III* would require dismissal of this action, were it remanded to the district court, under principles of *res judicata*. Therefore, Foster's petition should be denied on grounds of mootness.

#### B. No "Special and Important Reasons" Exist for Granting Foster's Petition.

Sup. Ct. R. 10 provides in part that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The Court has stated that "[c]ertiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished

from that of the parties . . . ” *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (citations omitted). Foster’s petition, however, raises no “special and important reasons,” and the questions for which Foster seeks review are not of public importance, but pertain only to the facts of this case. Foster seeks review of a simple and correct application of Fed. R. Civ. P. 4(c)(2)(C)(i) and Fed. R. Civ. P. (c)(2)(C)(ii) by the courts below which resulted in the dismissal of Foster’s complaint, without prejudice, because he failed to effect service within 120 days of filing, as required by Fed. R. Civ. P. 4(j). He also seeks review of the lower courts’ correct determinations that he did not show good cause for failing to comply with the rule, and that sanctions were not warranted against respondents. As discussed herein, there is nothing “special and important” about these determinations warranting an exercise of this Court’s discretion to review them, and therefore Foster’s petition should be denied.

1. *No “Special and Important Reasons” Exist Warranting Review of the Lower Courts’ Correct Determination that Foster Failed to Serve His Complaint Within the 120-Day Time Period Mandated by Fed. R. Civ. P. 4(j).*

Foster has always contended that he was trying to serve Rutgers by mail under the state service by mail rule, N.J. Ct. R. 4:4-4(a)(2), pursuant to Fed. R. Civ. P. 4(c)(2)(C)(i), rather than the federal service by mail rule, Fed. R. Civ. P. 4(c)(2)(C)(ii). Foster has always advanced his contention despite the fact that he mailed a Form 18-A to Rutgers in the same envelope in which he mailed the summons and complaint. Form 18-A states on its face: “The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure” (Ja30).

Whether Foster’s service by mail was attempted under the state rule or the federal rule, however, his service was not made within the 120-day time period mandated by Fed. R. Civ. P. 4(j), and, for that reason, along with the absence of good cause, his action was dismissed by the courts below for his failure to effect timely service.



Under both the federal and state service by mail rules, service is not effected unless and until the defendant affirmatively acknowledges service. Fed. R. Civ. P. 4(c)(2)(C)(ii); N.J. Ct. R. 4:4-4(a)(2) (service "shall be effective only if the party served answers or otherwise appears in response thereto").

Rutgers promptly acknowledged receipt of the summons and complaint on December 23, 1988 (Ja30). However, since Foster had dallied for so long before placing the papers in the mail, it was already past the 120th day.

Foster suggests that his petition should be granted because "[t]his Court has never ruled on whether F.R.C.P. 4(j) applies when service is attempted under F.R.C.P. 4(c)(2)(C)(i) by a person authorized to make such service by state law" (Petition at 28-29). The Court need not consider this supposed issue, however, because Fed. R. Civ. P. 4(j) makes only one exception to the 120-day limit: service in a foreign country pursuant to Fed. R. Civ. P. 4(i). No exception is made for service under a state law method. Therefore, Foster was bound to comply with Fed. R. Civ. P. 4(j) whether he was attempting service under the federal mailed service method or the state method.

Foster also asserts that his petition should be granted because the Court 'has never passed on the question of when service is "made" within the meaning of Fed. R. Civ. P. 4(j)' (Petition at 32). Foster argues:

Since most civil litigation in the Federal courts is commenced by the service of a summons and complaint, and many suits are no doubt commenced by service of a summons and complaint pursuant to F.R.C.P. 4(c)(2)(C)(i), consideration of this Court of what law governs the determination of when such service is "made" within the meaning of F.R.C.P. 4(j), of when such service is "made", whether or not F.R.C.P. 4(j) applies when such service is made by someone authorized to make such service under state law, and who should bear the burden of proving untimeliness of service are important questions of Federal law which . . . should be settled by this Court.



(Petition at 34-35). Of course, contrary to Foster's contention, civil actions in federal court and the New Jersey state courts are commenced, not by service but, "by filing a complaint with the court." Fed. R. Civ. P. 3; N.J. Ct. 4:2-2. Further, there is no need for this Court to exercise its discretion to review the question of when service is made for purposes of Fed. R. Civ. P. 4(j) when service by mail is attempted under New Jersey court rules because New Jersey court rules make it clear that such service cannot be effective unless "the party served answers or otherwise appears in response thereto." N.J. Ct. R. 4:4-4(a)(2). Clearly, until the party "answers or otherwise appears," no effective service has taken place under New Jersey's optional mailed service provisions.

The only service issue decided by the courts below, and that needed to be decided, was whether Foster effected service within the 120 days required by Fed. R. Civ. P. 4(j). Nonetheless, Foster has tried to raise a variety of issues before this Court which simply are not present in this case.

For example, Foster argues that the decisions of the courts below are in conflict with "a decision by New Jersey's court of last resort" (Petition at 36-38). However, the decision cited by Foster, *County v. Pacific Coast Borax Co.*, 68 N.J.L. 273, 53 A. 386 (E. & A. 1902), bears absolutely no relevance to the instant matter. The *County* decision concerned the date of commencement of an action for statute of limitations purposes, not the effective date of service. See *County*, 68 N.J.L. at 274, 53 A. at 386 (affirming the lower court's ruling that an action was commenced "when process duly tested and issued was put in the hands of the sheriff for the purpose of being served"). The *County* decision does not address the issue of when service is made and therefore the decisions of the courts below are not in conflict with it. In any event, the *County* decision has been superseded by New Jersey's court rules. Civil actions in New Jersey are now commenced "by filing a complaint with the court," pursuant to N.J. Ct. R. 4:2-2, which became effective September 8, 1969.

There was no determination below as to when the action was commenced for the purposes of determining when a statute of

limitations was tolled. Indeed, if such an issue had been raised and addressed, the courts below would have determined that the service issue is irrelevant to the statute of limitations issue under both federal and state law. New Jersey law, like federal law, provides that an action is commenced, for the purpose of tolling the limitations period, when the complaint is filed. Fed. R. Civ. P. 3; N.J. Ct. R. 4:2-2; *West v. Conrail*, 481 U.S. 35, 39 (1987). Hence, there is no issue presented similar to that determined in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

Furthermore, Rutgers is not amenable to service by mail under state law unless it affirmatively waives personal service requirements under state law. Pursuant to New Jersey law, Rutgers is a public body. See, e.g., N.J.S.A. 18A:65-2 (Rutgers is "the instrumentality of the state for the purpose of operating the state university"). Service upon a public body pursuant to New Jersey's service rules may only be made by personal service. N.J. Ct. R. 4:4-4(g). Waiver of personal service can be accomplished only by a general court appearance or written acknowledgment. N.J. Ct. R. 4:4-6.

Although Foster states that he "has never claimed that he attempted service under F.R.C.P. 4(c)(2)(C)(ii)" (Petition at 39), he nevertheless devotes approximately 13 pages of his petition to argue that this Court should address the issue of when service is "made" under Fed. R. Civ. P. 4(c)(2)(C)(ii). The district court determined that, assuming Foster had attempted service under Fed. R. Civ. P. 4(c)(2)(C)(ii), he failed to effect service within 120 days of filing. The United States Court of Appeals for the Third Circuit affirmed this decision in this case in accord with its precedent. *Braxton v. United States*, 817 F.2d 238, 240 n.1 (3d Cir. 1987) ("service is complete either upon receipt by the sender of the defendant's official acknowledgment of service form within twenty days of the original first class mailing or upon effective personal service"); *Green v. Humphrey Elevator and Truck Co.*, 816 F.2d 877, 879-883 (3d Cir. 1987) (same). See also *Stranahan Gear Co. v. NL Industries, Inc.*, 800 F.2d 53, 56-7 (3d Cir. 1986) (service by mail pursuant to Rule 4(c)(2)(C)(ii) is not complete unless and until the official acknowledgment form is signed and returned).

The determinations of the courts below are also consistent with the decisions in ten of the eleven United States Courts of Appeals that have addressed the issue of when service is effected under Fed. R. Civ. P. 4(c)(2)(C)(ii). The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits, like the Third Circuit, have all held that federal mail service is not effective unless and until the official acknowledgment form is signed and returned. *Media Duplication Services, Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233-34 (1st Cir. 1991); *S.J. Groves & Sons Co. v. J.A. Montgomery, Inc.*, 866 F.2d 101, 102 (4th Cir. 1989); *McDonald v. United States*, 898 F.2d 466, 468 (5th Cir. 1990); *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155-56 (6th Cir. 1991); *Geiger v. Allen*, 850 F.2d 330, 332 n.3 (7th Cir. 1988); *Gulley v. Mayo Foundation*, 886 F.2d 161, 165 (8th Cir. 1989); *Worrell v. B.F. Goodrich Co.*, 845 F.2d 840, 841-42 (9th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989); *Schnabel v. Wells*, 922 F.2d 726, 728 (11th Cir. 1991); *Combs v. Nick Garin Trucking*, 825 F.2d 437, 443-48 (D.C. Cir. 1987).

The Second Circuit has held that, under certain circumstances, mailed service pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) may be effective where the defendant has received the summons, complaint and acknowledgment form but fails to sign and return the acknowledgment form. *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984). In *Morse*, the plaintiff mailed copies of the summons, complaint and acknowledgment form to the defendant. *Id.* at 36. Although the defendant received those documents, it failed to sign and return the acknowledgment form. *Id.* The plaintiff then personally served the defendant, but not until after the statutory limitations period had expired. Plaintiff's claim in *Morse* was brought pursuant to New York law. *Id.* Unlike federal and New Jersey actions, state law actions in New York are commenced when the summons is served upon the defendant. *Id.* at 36-37 (citing N.Y. Civ. Prac. L. §203(b)(1) (McKinney 1973)). On these facts and applying New York's substantive law, the Second Circuit held that the mailed service was effective for purposes of tolling the limitations period, even though the defendant had refused to sign and return the acknowledgment form. *Id.* at 39.

The *Morse* opinion has been severely criticized,<sup>5</sup> and, as noted above, has not been followed by any other circuit. In any event, this case is an inappropriate vehicle for review of the correctness of the *Morse* decision, because *Morse* has no applicability to this matter. Unlike the defendant in *Morse*, Rutgers promptly signed and returned the Form 18-A to Foster within the twenty-day period prescribed by both the acknowledgment form and Fed. R. Civ. P. 4(c)(2)(C)(ii). Further, *Morse* did not address the question of when federal mail service was effective for purposes of Fed. R. Civ. P. 4(j) (a federal procedural question), but rather considered only whether effective service had taken place for purposes of tolling of the state law limitations period (a state substantive law question). The unique factual circumstances and legal issues that led to the Second Circuit's decision in *Morse* simply are not present here. Therefore, *Morse* is inapplicable to the instant matter.

In sum, it is unnecessary for this Court to use its discretion to hear this case to determine when service by mail is "made" for purposes of Fed. R. Civ. P. 4(j), because, under the plain language of Fed. R. Civ. P. 4 (c)(2)(C)(ii), it is clear that service is not "made" unless and until the acknowledgment form is signed and returned. Ten circuit courts have reached this identical conclusion.

The Court has recently defined its adjudicatory role in cases involving court rules: "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). Rule revisions, if deemed necessary, are more appropriately made pursuant to this Court's rulemaking authority granted under the Rules Enabling Act, 28 U.S.C. §§ 2071, *et seq.* As such, there are no "special or important reasons" for granting certiorari in this matter, and therefore Foster's petition should be denied.

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<sup>5</sup> See, e.g., *Adatsi v. Mathur*, 934 F.2d 910, 911 (7th Cir. 1991); *Friedman*, 929 F.2d at 1155 n.5; *Media Duplication Services*, 928 F.2d at 1233-34; *Combs*, 825 F.2d at 445-48; *Green*, 816 F.2d at 881 n.8.

2. *No "Special and Important Reasons" Exist Warranting Review of the Lower Courts' Correct Determination That Foster Did Not Show "Good Cause" to Justify Late Service.*

Foster also requests that this Court review the determination of the courts below that he failed to show "good cause" for his untimely service under Fed. R. Civ. P. 4(j).<sup>6</sup> In particular, he asserts that the district court failed to apply the correct standards in making this determination (Petition at 51-55). Foster essentially argues that the district court failed to view his allegations in the light most favorable to him (Petition at 53-54). This is not so. The district court determined that, based upon Foster's own account of the steps he took to attempt service, Foster failed to show good cause justifying late service. Indeed, Foster's own account, fully credited, is a tale of intentional delay. Foster knew at least two things a month after he filed the complaint: one, he intended to serve by mail; and two, he had to complete service within 120 days of filing. Yet, he waited another three months before placing the summons and complaint in the mail.

The scope of appellate review of the district court's determination is whether the district court abused its discretion. *Braxton v. United States*, 817 F.2d 238, 242 (3d Cir. 1987). The Court has held that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 110 L. Ed.2d 359, 382 (1990). The Third Circuit already has determined that the district court did not abuse its discretion. What Foster seeks here is, not consideration of "important questions of Federal law" (Petition at 55) but rather, yet another review of the district court's assessment of the evidence. Such a review is not a sufficient reason for this Court to exercise its discretionary certiorari

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<sup>6</sup> Dismissal for failure to effect service within the 120-day period provided by Fed. R. Civ. P. 4(j), absent a showing of "good cause" by the plaintiff, is mandatory. See *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 84 (3d Cir.) ("The 120-day limit to effect service of process, established by Fed. R. Civ. P. 4 (j) is to be strictly applied . . ."), *cert. denied*, 484 U.S. 965 (1987).

jurisdiction. See *Cooter & Gell*, 110 L. Ed.2d at 381 (“Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise” [citations omitted]). Therefore, Foster’s petition should be denied with respect to the determination of the courts below that he failed to show good cause justifying late service.

3. *No “Special and Important Reasons” Exist Warranting Review of the Lower Courts’ Correct Determination Denying Foster’s Motion for Sanctions.*

Foster also seeks review of the lower courts’ correct decision to deny his motion for sanctions pursuant to Fed. R. Civ. P. 11. Foster sought sanctions against Rutgers’ counsel for filing the motion to dismiss for Foster’s failure to effect timely service under Fed. R. Civ. P. 4(j).

Foster contends that Rutgers’ counsel should not have relied upon Foster’s mailing of a Form 18-A to Rutgers in support of Rutgers’ claim that Foster was following the federal service by mail rule, Fed. R. Civ. P. 4(c)(2)(C)(ii). Foster contends Rutgers’ counsel should have been confused as to Foster’s attempted method of service due to Foster’s failure to sign Form 18-A, Foster’s inclusion of only one copy, instead of two copies, of Form 18-A, and Foster’s use of certified mail, instead of ordinary mail. Foster contends that such confusion should have led Rutgers’ counsel to make “reasonable inquiry” by calling Foster to find out what method of service he was trying to employ. Foster contends that if Rutgers’ counsel had so inquired, Foster would have advised he was attempting service under the New Jersey service by mail rule.

The district court succinctly ruled:

Plaintiff claims that because his enclosed Form 18-A was not signed, defendants are not within their rights in moving for dismissal. However, plaintiff cannot assert his own deficiency regarding his method of service, especially in light of the fact that plaintiff’s service was untimely whether he was following the service



procedures under federal or state rules. The court denies plaintiff's cross-motion for sanctions.

(Pet. App. 76).

The courts below quite rightly rejected Foster's preposterous contention, and denied his motion. The Court has held that a Rule 11 determination by a district court is subject to an abuse of discretion standard of review. *Cooter & Gell*, 110 L. Ed.2d at 381-82. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." 110 L. Ed.2d at 382. As is obvious by the facts presented by Foster in support of his motion, neither the district court's view of the law nor its assessment of the evidence was clearly erroneous. Clearly, this issue does not warrant further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**BRIEF IN OPPOSITION OF RESPONDENT  
RUTGERS COUNCIL OF AAUP CHAPTERS**

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February 1992

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**COUNTERSTATEMENT OF QUESTIONS  
PRESENTED FOR REVIEW**

1. Whether the decisions of the United States District Court and the United States Court of Appeals for the Third Circuit that petitioner failed to serve respondents with a copy of the summons and complaint within the 120 day period required by F.R.Civ.P. 4(j) are correct.
2. Whether the decisions of the courts below that petitioner did not establish "good cause" for his failure to serve respondents with a copy of the summons and complaint within the 120 day period required by F.R.Civ.P. 4(j) are correct.
3. Whether, as determined by the district court and court of appeals, there was no basis for an award of sanctions against respondents under F.R.Civ.P. 11.

## **LIST OF PARTIES TO THIS PROCEEDING**

### **Petitioner:**

Philip E. Foster

### **Respondents:**

Rutgers, the State University

The Rutgers Council of the American Association of  
University Professors<sup>1</sup>

The American Association of University Professors

### **Parties Appearing In The District Court Not Parties To This Proceeding:**

Permanent Panel on Procedures<sup>2</sup>

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1. The correct name for this party is Rutgers Council of AAUP Chapters.

2. Petitioner did not appeal the dismissal with prejudice of the Permanent Panel on Procedures to the United States Court of Appeals for the Third Circuit.

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No. 91-1082

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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PHILIP E. FOSTER,

*Petitioner,*

vs.

RUTGERS, THE STATE UNIVERSITY, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

**BRIEF IN OPPOSITION OF RESPONDENT  
RUTGERS COUNCIL OF AAUP CHAPTERS**

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Respondent Rutgers Council of AAUP Chapters respectfully requests that this Court deny the petition for a writ of certiorari. The petition raises no special and important issues for granting the writ. Petitioner has not established that he is entitled to review of the decision of the Court of Appeals for the Third Circuit applying the Federal Rules of Civil Procedure to the undisputed facts.

## STATEMENT OF THE CASE

### *A. Proceedings Below*

Petitioner Philip E. Foster ("Foster") commenced this action against Rutgers, the State University ("Rutgers"), The Rutgers Council of American Association of University Professors ("Council"), The American Association of University Professors ("AAUP") and The Permanent Panel on Procedures ("PPP") by filing of a complaint with the United States District Court for the District of New Jersey on August 24, 1988).<sup>3</sup> (Pet. App. 99-137).<sup>4</sup> The complaint alleged that Foster's three year term employment contract as an untenured faculty member with Rutgers had improperly not been renewed. (Pet. App. 67, 99-137). The Council is the exclusive bargaining representative for faculty members at Rutgers, including Foster, pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 *et seq.* Foster, in essence, claimed that the Council had breached its duty of fair representation to Foster in its handling of grievances on Foster's behalf allegedly by interfering with his employment contract with Rutgers and conspiring with Rutgers to violate his rights.

The Council did not file an answer to the complaint. Rather, on January 18, 1989, the Council filed a motion pursuant to F.R.Civ.P. 12(b)(2),(4) and (5) to dismiss the

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3. The Council had not been named as a party nor served with the action entitled *Fosters v. Rutgers, et al*, 86 Civ. 6765 (S.D.N.Y.) which was filed on September 2, 1986. The dismissal of that action on February 2, 1987 was affirmed by the United States Court of Appeals for the Second Circuit. *Fosters v. Rutgers, et al*, No. 87-7470 (2d Cir. 1987). Petitioner did not seek certiorari in that action.

4. "Pet. App." refers to the Appendix to Foster's Petition commencing on p. 61 of that document.

complaint because it had not been served within the 120 day limit after filing set forth in F.R.Civ.P. 4(j). (JA 31)<sup>5</sup> The Council also moved to quash service on the ground, *inter alia*, that the Form 18-A was not signed.<sup>6</sup>

On February 14, 1989 Foster cross-moved to declare his service of Form 18-A null and void, to hold an evidentiary hearing, to enlarge the time to make service and to impose sanctions on respondents' attorneys. By decision and order dated May 3, 1989, the district court granted respondents' dismissal motions and dismissed Foster's complaint without prejudice pursuant to F.R.Civ.P. 4(j). The motions to quash service and Foster's cross-motions were denied. (Pet. App. 66-81).

After the dismissal, Foster filed a motion to amend or alter the May 3, 1989 order pursuant to F.R.Civ.P. 59. The district court found that the motion had been filed after the time specified in the rule and consideration was, therefore, barred. However, the court reviewed Foster's motion under F.R.Civ.P. 60(b) and on January 19, 1990 denied the motion. (Pet. App. 82-92).

On February 7, 1990, Foster appealed the May 3, 1989 and January 19, 1990 orders to the United States Court of Appeals for the Third Circuit. (JA 1). By Judgment Order dated July 24, 1990, the court of appeals affirmed the judgment and orders of the district court. (Pet. App. 62-64). A petition for rehearing filed by Foster was denied on August 21, 1990. (Pet. App. 95-96).

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5. "JA" refers to documents which were part of the Joint Appendix to the United States Court of Appeals for the Third Circuit, but not reproduced in the petition or in this brief in opposition.

6. The AAUP, at that time represented by the same counsel, also filed a motion to dismiss the complaint and to quash the service. Rutgers filed a motion to dismiss for failure to effect timely service pursuant to F.R.Civ.P. 4(j) on January 9, 1989.

On June 25, 1990, while his appeal from the dismissal of this action was pending before the Third Circuit, Foster filed another action in the District of New Jersey making the identical allegations against the Council and the other respondents. Five out of the six counts of this new complaint were dismissed as against the Council and the AAUP on motion to dismiss pursuant to F.R.Civ.P. 12(b). Rutgers did not move for dismissal at that time, but filed an answer to the complaint. Subsequently, the entire complaint was dismissed with prejudice as to Rutgers on the basis of Foster's failure to comply with discovery orders.

The Council and the AAUP have recently moved to dismiss the remaining count due to Foster's continued failure to comply with court-ordered discovery deadlines, despite having been granted extensions and having been reprimanded by the district court. These motions are currently pending determination by the district court.

#### ***B. Facts***

Foster's complaint alleges the failure of Rutgers to renew his reappointment as an Associate Professor at the Graduate School of Management in Newark, New Jersey, after the expiration of his initial three year appointment from 1984 to 1987. According to his complaint, Foster filed five grievances with the Council which were processed through the grievance procedure contained in the collectively negotiated agreement between Rutgers and the Council. (Pet. App. 105, 107, 110, 112, 114). Foster's complaint sets forth claims against the Council for wrongful interference with contractual relations between Foster and Rutgers and for alleged breach of the duty of fair representation.

Foster filed his complaint with the clerk of the United States District Court for the District of New Jersey on August 24, 1988. Pursuant to the 120 day period set forth in

F.R.Civ.P. 4(j), Foster was required to have completed service of his complaint by December 22, 1988.

In August 1988 Foster sent a letter to the Council and to its legal counsel stating that the Council had been named in Foster's complaint against Rutgers and asking whether mail service would be accepted. (Pet. App. 148, 169-170). Foster did not send a copy of his complaint with the letter, nor did he set forth any summary or description of his claims against the Council. He did not specify whether the Council was just mentioned in the complaint, whether it was named only as a party to the contract or whether it was named as a bad actor. He also did not specify the court in which he filed the complaint, whether it was state or federal court, or in which state he had filed. The Council's attorneys advised Foster that they were not authorized to accept service of process on behalf of the Council. (Pet. App. 176-177). Professor Judy Green, the President of the Council, wrote to Foster and advised him that the Council would accept service pursuant to the rules of the forum in which he filed the complaint. (Pet. App. 178-179). The Council did not hear from petitioner again until approximately four months later.

According to Foster, he mailed the summons, complaint and Form 18-A to the Council on the Rutgers campus on December 19, 1988.<sup>7</sup> (Pet. App. 154-160). After being routed through the Rutgers mail room, the package arrived at the Council offices on December 23, 1988. The person who accepted the package was a Staff Assistant and not authorized to accept or acknowledge service of process on behalf of the Council. (JA 52-53). The Council offices were officially closed during the period from Christmas Day to New Year's Day for the winter recess. Prof. Green, was not at the Council offices from December 23, 1988 until January 12, 1989. It was on this latter date that she actually received a copy of the package. (JA 71-72). The Form 18-A was not signed by Foster or any other person. In light of the failure of petitioner to have

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7. This mailing was 117 days after the filing of the complaint.



executed or dated the sworn declaration which is part of the Form 18-A, neither Prof. Green nor any other officer or authorized representative of the Council signed or returned the acknowledgment. (Pet. App. 200-204).

On February 10, 1989, petitioner had a copy of the summons and complaint hand-delivered to the Council. Prof. Green signed an acknowledgment of service at that time. (Pet. App. 209).

## REASONS FOR DENYING THE WRIT

### **A. The Petition Presents No Special And Important Reasons For Granting The Writ, Since Foster's Service Of His Complaint Cannot Be Deemed Timely Under Any Method Of Mail Service**

Foster does not contend that within 120 days after he filed his complaint he attempted service by any other method than mail delivery. The federal rules provide for two different possible methods of mail service. F.R.Civ.P. 4(c)(2)(C)(i) allows service by mail using the same procedures that the state allows for such service. F.R.Civ.P. 4(c)(2)(C)(ii) sets out a separate method of service by mail using Form 18-A, independent of state service rules. If as a matter of factual inquiry, Foster's service cannot be deemed timely under either method of service, there are no important legal issues for decision by this Court.

While Foster has contended that he did not attempt service under F.R.Civ.P. 4(c)(2)(C)(ii), his inclusion of Form 18-A can lead only to conclusion that he in fact chose to make service under that provision. The courts below decided that service under this provision was not effected within the 120 day requirement of F.R.Civ.P. 4(j), because service is not complete unless and until the official acknowledgment form is signed and returned. This decision is in accord with applicable Third Circuit precedent. *Braxton v. United States*, 817 F.2d 238, 240 n.1 (3d Cir. 1987); *Green v. Humphrey Elevator and Truck Co.*, 816 F.2d 877 (3d Cir. 1987); *Stranahan Gear Co. v. NL Industries, Inc.*, 800 F.2d 53 (3d Cir. 1986).

The decision in this case is also supported by similar determinations of the other courts of appeals. For the purpose of an analysis under F.R.Civ.P. 4(c)(2)(C)(ii), the other circuits

agree that mail service is not effective until the official acknowledgment is signed and returned. *Combs v. Nick Garin Trucking*, 825 F.2d 437, 443 (D.C.Cir. 1987); *Media Duplication Services, Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233-4 (1st Cir. 1991); *S.J. Groves & Sons Co. v. J.A. Montgomery, Inc.*, 866 F.2d 101, 102 (4th Cir. 1989); *Traina v. United States*, 911 F.2d 1155 (5th Cir. 1990); *Friedman v. Estate of Jackie Presser*, 929 F.2d 1151, 1157 (6th Cir. 1991); *Williams v. Leach*, 938 F.2d 769, 771-2 (7th Cir. 1991); *Gulley v. Mayo Foundation*, 886 F.2d 161, 165 (8th Cir. 1989); *Worrell v. B.F. Goodrich Co.*, 845 F.2d 841-2 (9th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989); *Schnabel v. Wells*, 922 F.2d 726, 728 (11th Cir. 1991). See also *Cox v. Sandia*, 941 F.2d 1124, 1126 (10th Cir. 1991).

The only court of appeals which appears to adopt a slightly different analysis is the Second Circuit. In *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984), the Second Circuit, applying the substantive law of the State of New York (which provides that an action is commenced when served not when filed), held that incomplete mail service under F.R.Civ.P. 4(c)(2)(C)(ii) was sufficient to toll the statute of limitations where the party received actual notice. The Second Circuit did not address the issue of whether incomplete service under the federal rules would toll the 120 day service limit set forth in F.R.Civ.P. 4(j). The indication is that this circuit, consistent with the other circuits which have addressed this issue, would hold that it does not. In *Frasca v. United States*, 921 F.2d 450, 453 (2d Cir. 1990), the Second Circuit held that "[i]f service is not complete by the end of the 120 days," dismissal is mandatory absent good cause, and the plaintiff must refile the complaint.

Foster claims that, notwithstanding his inclusion of the Form 18-A, he properly made service under F.R.Civ.P. 4(c)(2)(C)(i). However, he did not make timely service either with reference to F.R.Civ.P. 4(j) or with respect to the New Jersey Court Rules. Since Foster claims that he had chosen the method of service provided in the state rules, he was bound

to comply with R.4:4-1, New Jersey Court Rules, which provides:

The plaintiff, his attorney or the clerk of court may issue the summons. If a summons is not issued within 10 days after the filing of the complaint the action may be dismissed in accordance with R.4:37-2(a).<sup>8</sup>

For the purposes of this rule, issuance of process is clearly interpreted to include service of process upon the adverse party. See *Tall Timbers Property Owners Assn. v. Tall Timbers, Inc.*, 217 N.J. Super. 119, 121 (App.Div. 1987).

In his arguments to the courts below, Foster maintained that under the New Jersey Court Rules service of his complaint was effective when mailed. However, R.1:5-1(a), New Jersey Court Rules, clearly provides that only service of "pleadings subsequent to the original complaint" are effective in that manner. There is no evidence that the New Jersey Supreme Court wished to change the provisions of R.4:4-4(a)(2), New Jersey Court Rules, which provides for effective service by mail only if "the party served answers or otherwise appears in response thereto."

Under the New Jersey Court Rules, the maximum amount of time from the filing of the complaint to the completion of mail service under the New Jersey state rules is 70 days. This 70 day period is arrived at by combining the time for issuance of the summons in R.4:4-1 (10 days) with the maximum amount of time in which an answer must be received before the party must serve the complaint by another means (60 days). If mail service is not complete within a maximum of 70 days from the filing of the complaint, a plaintiff has another 10 days to issue another summons and serve the complaint by a means

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8. R.4:37-2(a), New Jersey Court Rules, provides that the court "in its discretion" may dismiss the complaint on defendant's motion for failure to issue the summons within 10 days after the complaint was filed.

other than mail service. Thus, at most a plaintiff has 80 days to attempt mail service and perfect service by another means.

Foster did not accomplish service by another means until February 10, 1989, 170 days after the complaint was filed. Consequently, Foster's attempt at service was at least 90 days beyond the limit set by the New Jersey Court Rules.<sup>9</sup>

Foster argues in his petition that he should be able to add any time period set forth in a state rule to the end of the 120 day period established by F.R.Civ.P. 4(j). This is neither the meaning or intent of F.R.Civ.P. 4(c)(2)(C)(i). While this section speaks of serving a complaint "pursuant to the law of the State in which the district court is held," it is plain that only the method of service is adopted. The time for service continues to be governed by the federal rules themselves. Otherwise, the 120 limit for service in F.R.Civ.P. 4(j) would be meaningless. The principle that the method, but not the time periods, may be taken from the state rules is supported by the case of *West v. Conrail*, 481 U.S. 35, 40 n.7 (1987). This Court declined to adopt the procedural requirement in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), that a complaint be both filed and served within the six month limitation period, noting that "the requirement of timely service in Rule 4(j)" satisfies the need for defendants to receive prompt notice of a suit filed against them without recourse to outside statutes. F.R.Civ.P. 4(j) was seen as an important safeguard against burdening defendants with untimely actions.

Petitioner does more than just argue for the adoption of the state time period for service. Since his service would still be untimely even if the period allowed by the New Jersey rules were adopted, he argues instead that the state period should be

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9. In filing its motion to dismiss on January 18, 1989, the Council made a special appearance for the purpose of challenging service. Even if this could be considered a general appearance for the purpose of counting days for service, Foster is still more than 60 days beyond the time period allowed by the state rules.

grafted on to the end of the federal period. The fallacy in Foster's approach is self-evident. If a state rule would allow for service of a complaint within one year of filing, petitioner's argument by extension would be that service within 485 days would still be timely notwithstanding the provisions of F.R.Civ.P. 4(j).

While Foster attempts to cast the issues in his petition as presenting open questions as to when service is "made" under the federal rules, in reality he seeks to have this Court revise the clear words to expand the rules so that his own improper actions will be able to be fit within their scope. This Court should decline to review the application of the rules by the courts below, which are correct applications of the federal rules to the particular facts of this case.

**B. Foster's Petition Presents No Special  
And Important Reasons For Granting  
The Writ, Since Foster Cannot  
Establish That The Courts Below  
Abused Their Discretion In Finding  
That He Did Not Show "Good Cause"  
To Justify Late Service**

Foster, although proceeding on this matter pro se, is a licensed attorney who spent the several years prior to his employment at Rutgers engaged in the practice of law. (Pet. App. 139-140, 188). Foster asserts that shortly after September 9, 1988 a person at the clerk's office informed him that service could be made by certified mail and that the judge's law clerk told him that service of the complaint had to be made within 120 days of filing. (Pet. App. 150). He also has certified that around mid-September 1988 he performed legal research regarding methods of service. (Pet. App. 151-152). Foster did not explain why he was unable to accomplish service between September 9, 1988 (when he was told he could make service by certified mail) and December 19, 1988 (when he finally mailed the summons, complaint and Form 18-A), despite the fact that

he did not have full-time employment and was collecting unemployment compensation. (Pet. App. 153).

The trial court found that petitioner stated "several times in his papers that he researched federal law regarding service of process." (Pet App. 70). The court concluded that had Foster performed his research with diligence, he would have been aware that service would not be complete until defendants returned the Form 18-A. He could have foreseen the consequences of not attempting mail service long before he did and therefore "did not make substantial good faith efforts towards compliance with the federal rules." *Ibid.*<sup>10</sup>

Under F.R.Civ.P. 4(j) a complaint not served within the time period set by the rule, absent good cause, is subject to dismissal by the court *sua sponte* or on motion. On the basis of the facts to which petitioner himself has admitted, he had adequate time to make service, adequate knowledge of how service should be made and no stated reason for delay or inability to comply with the rules. Under these circumstances, it cannot be found that the court either had an erroneous view of the law or a clearly erroneous assessment of the evidence in finding that petitioner had not made the requisite showing of good cause. See *Cooter & Gell v. Hartmarx*, \_\_ U.S. \_\_, 110 S.Ct. 2447 (1990). The petition therefore does not have merit to warrant that the writ be granted on this issue.

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10. Moreover, if petitioner really were operating on a good faith belief that service would have been timely as long as he attempted mail service with the 120 day period, he should have immediately attempted service on the Council by another means when he did not receive the returned signed acknowledgment after 20 days. However, he did not take prompt action. Rather, he did not attempt service by another means until 53 days after mailing.



**C. Foster's Petition Presents No Special  
And Important Reasons For Granting  
The Writ, Since Foster Cannot  
Establish That The Courts Below  
Abused Their Discretion In Denying  
His Motion For Sanctions**

The crux of petitioner's motion for sanctions pursuant to F.R.Civ.P. 11 against the attorney for the Council was that since Foster did not sign the Form 18-A when he mailed the summons and complaint to the Council, the attorney should have made reasonable inquiry by calling him to find out whether he was attempting service under F.R.Civ.P. 4(c)(2)(C)(i) or (ii). Foster apparently claims that opposing counsel's failure to call him led to the filing of a motion to dismiss which Foster claims has no basis.

The lower courts found that the motion to dismiss was meritorious under either provision of the federal rule. Thus, petitioner's argument does not have any basis in logic or reality. Moreover, as the district court found, it would be highly improper to allow petitioner's own deficiencies to be used as the basis for a motion for sanctions. (Pet. App. 76). For these reasons, there is no substantial basis for this Court to grant further review of the denial of sanctions.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1992



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CASE NO. 91 1082

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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PHILIP E. FOSTER,

Petitioner,

v.

RUTGERS, THE STATE UNIVERSITY,  
et al.,

Respondents.

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OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, THE AMERICAN ASSOCIATION  
OF UNIVERSITY PROFESSORS

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5. There is no split in the Circuits as to when service of a Summons and Complaint is made within the meaning of <u>Fed. R. Civ. P. 4(j)</u> . . . . .	14



6. The Third Circuit applied the correct standards in determining whether the pleadings alleged "good cause" within the meaning of Fed. R. Civ. P. 4(j). . . . . 18

7. The Third Circuit applied the correct standards in determining whether "reasonable inquiry" within the meaning of Fed. R. Civ. P. 11 had been shown. . . . . 20

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<u>United States v. Northern Finance Corp.,</u> 16 <u>F.2d</u> 999 (2d Cir. 1927).....	14



<u>Walker v. Armco Steel Corp.,</u> 446 <u>U.S.</u> 740 (1980) .....	6, 7
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<u>West v. Conrail,</u> 481 <u>U.S.</u> 35 (1987) .....	6, 7
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### STATE CASES

<u>County v. Pacific Coast Borax Co.,</u> 67 <u>N.J.L.</u> 48, 50 <u>A.</u> 906 (Sup. Ct. 1902), <u>aff'd</u> , 68 <u>N.J.L.</u> 273, 53 <u>A.</u> 386 (E. & A. 1902) .....	9, 10
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<u>Tall Timbers Property Owners Ass'n. v. Tall</u> <u>Timbers, Inc.,</u> 217 <u>N.J. Super.</u> 119, 524 <u>A.2d</u> 1315 (App. Div. 1987) <u>questioned on other grounds,</u> <u>Cogdell v. Hospital Center at</u> <u>Orange,</u> 116 <u>N.J.</u> 7, 560 <u>A.2d</u> 1169 (1989) .....	6
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### FEDERAL RULES

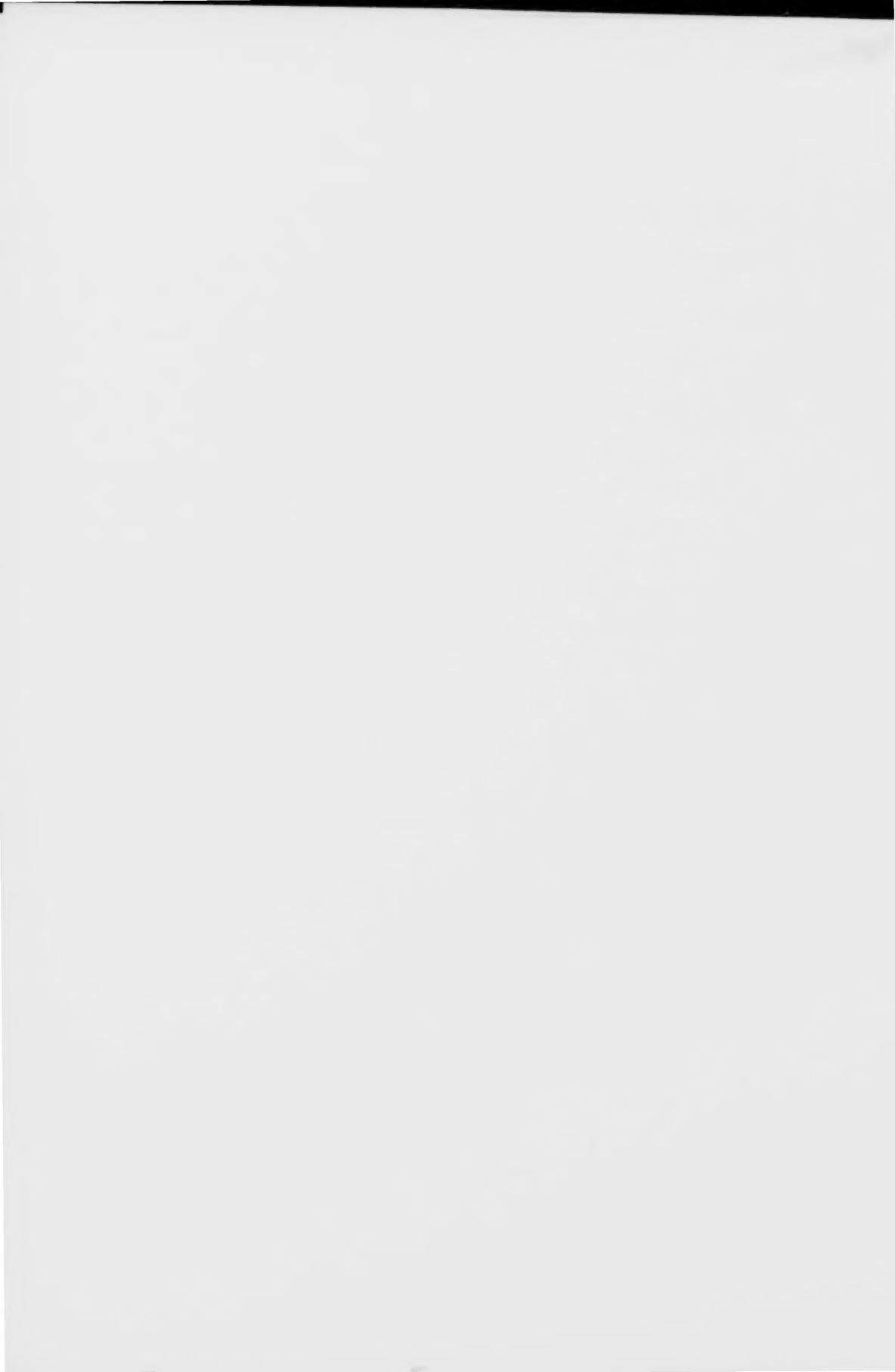
<u>Fed. R. Civ. P.</u> 1 .....	5
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<u>Fed. R. Civ. P.</u> 5 .....	12
<u>Fed. R. Civ. P.</u> 5(a) .....	12
<u>Fed. R. Civ. P.</u> 5(b) .....	12
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<u>Fed. R. Civ. P. 81</u> .....	5
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NEW JERSEY RULES

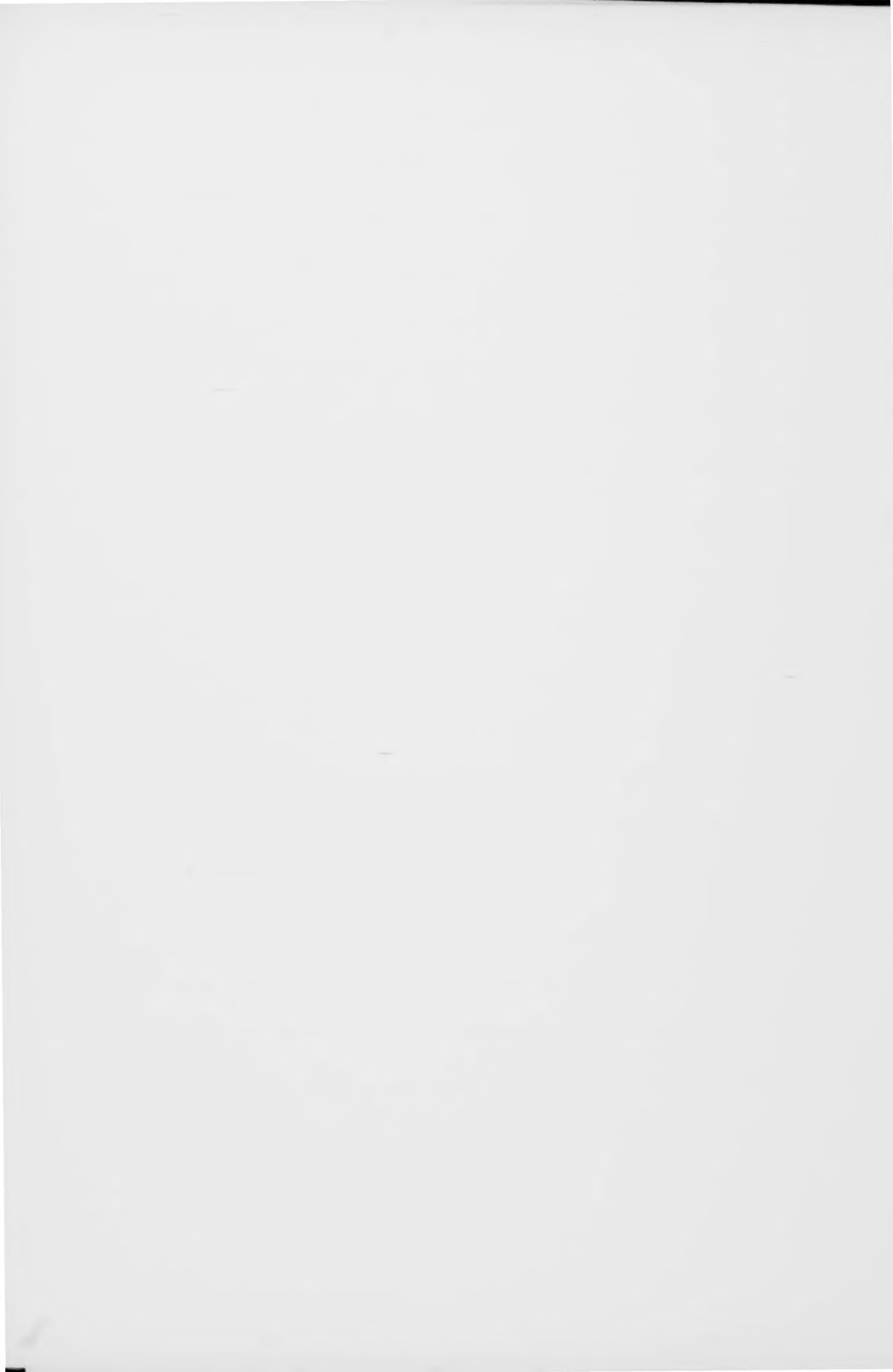
<u>R. 4:4-1</u> .....	5, 11
<u>R. 4:4-4(a)(1)</u> .....	11
<u>R. 4:4-4(a)(2)</u> .....	10
<u>R. 4:37-2(a)</u> .....	6



### STATEMENT OF THE CASE

The American Association of University Professors (hereinafter "the Association") does not adopt the petitioner's Statement of the Case since many of the facts set forth are not within the knowledge of the Association. However, with respect to the Association, there are many inaccuracies and omissions in the petitioner's Statement of the Case.

The petitioner is seeking review of the lower court's determination dismissing his Complaint on the basis that he failed to timely serve the Summons and Complaint on the respective defendants. The petitioner's Complaint was filed on August 24, 1988 (Pb 15) and pursuant to Fed. R. Civ. P. 4(j) service must have been duly completed by December 22, 1988. The Summons, Complaint and Form 18-A in this matter were sent to the Association's offices in Washington, D.C. by United States first-class mail. The Association received the package on December 28, 1988. (Appendix





3a). According to the undisputed evidence, the Postal Service did not require that the package be signed for and the return receipt was still affixed to the envelope when it was delivered. The return receipt was not taken back by the Postal Service. (Appendix 3a-4a). The petitioner never attempted to serve the Association at any later date or in any other manner.

Therefore, the Association was not served within the time period designated by Fed.R.Civ.P. 4(j).

#### SUMMARY OF ARGUMENT

The petitioner has sought this Court to address the procedural issue of when service of process is made. Although service of process was not completed within 120 days, as required by the Federal Rules of Civil Procedure, the petitioner argues he mailed the Summons and Complaint to the respective defendants within 120 days, therefore service was



timely made. However, the petitioner relies upon case law which is inapposite and readily distinguishable from the instant facts.

Additionally, the petitioner also incorrectly argues that there is a split in the circuits regarding the instant service of process issue. The case law which the petitioner cites, however, discusses a different issue which is readily distinguishable from his failure to serve the Association within the 120 day time frame. Moreover, the petitioner has not demonstrated that his failure to serve the Association timely with process was based upon "good cause"; thereby providing relief from the 120 day requirement.

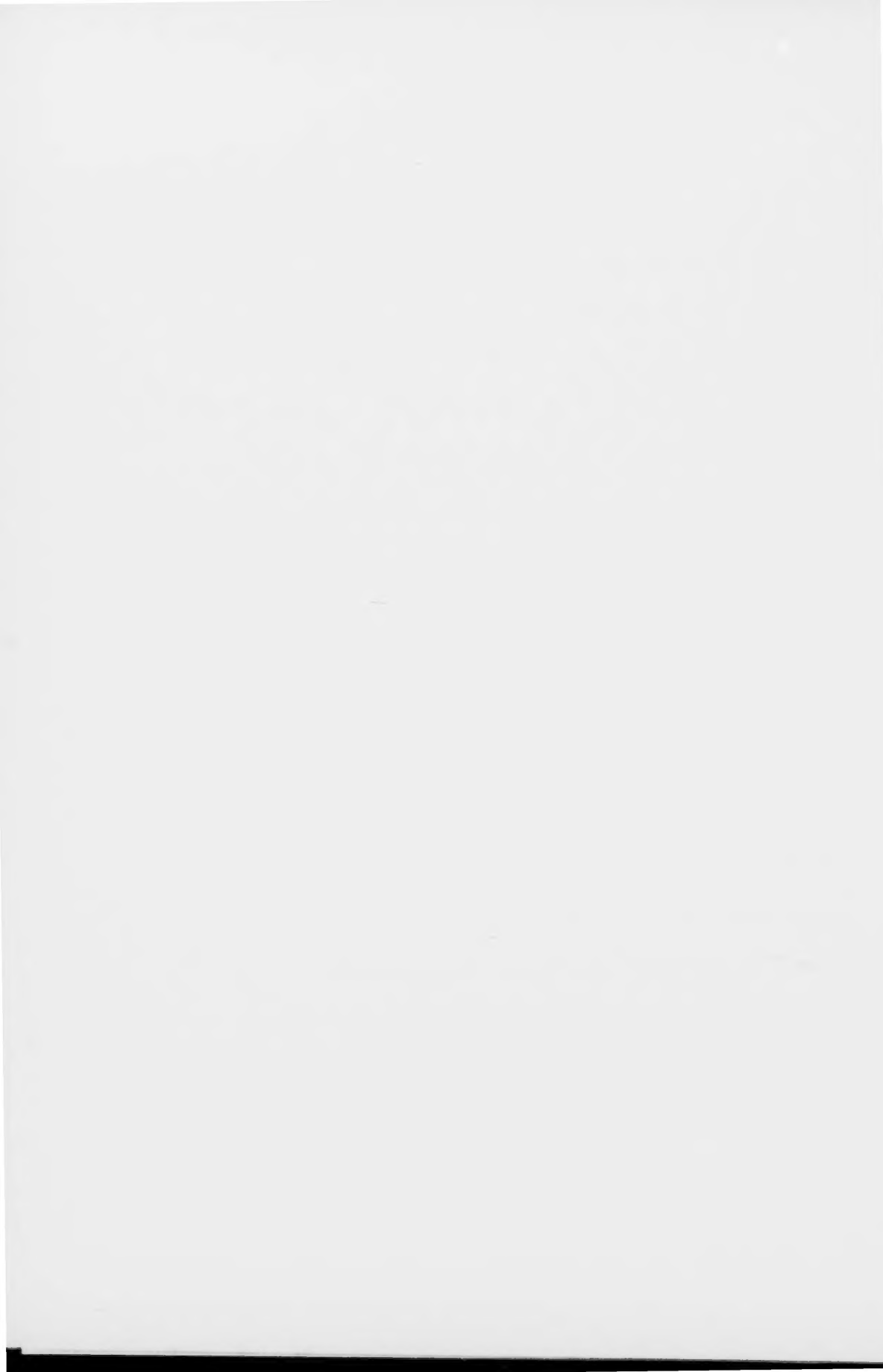
Finally, the Third Circuit applied the correct standards in determining whether a "reasonable inquiry" was made by the Association prior to the filing of their motion to dismiss the Complaint. This determination resulted in the denial of the petitioner's motion for Rule 11 sanctions.



### ARGUMENT

1. Service of a Summons and Complaint is not made within the meaning of Fed. R. Civ. P. 4(j) when service is attempted under Fed. R. Civ. P. 4(c)(2)(C)(i).

First, the petitioner argues that pursuant to Fed. R. Civ. P. 4(c)(2)(C)(i) he attempted service under New Jersey's Court Rule 4:4-4 and, therefore, the 120 day requirement of Fed. R. Civ. P. 4(j) is inapplicable. In its opinion, the District Court specifically considered this question and held that while Fed. R. Civ. P. 4(c)(2)(C)(i) permits the election of the State method for making service, "it does not provide that the plaintiff will then be governed by all of the state rules for perfecting service." [Pa 72]. Therefore, the District Court held the 120 day requirement of Fed. R. Civ. P. 4(j) was still applicable. This ruling was affirmed by the Third Circuit (Pa 62 to 63).



The District Court's decision was correct because Fed. R. Civ. P. 4(c)(2)(C)(i) merely governs the manner of service of process and does not supersede the time limit for service addressed in subsection 4(j). The petitioner completely ignores Fed. R. Civ. P. 1 which states:

These rules [Federal Rules of Civil Procedure] govern the procedure in the United States District Courts in all suits of the civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Therefore, the District Court was duty-bound to follow the provisions of the Federal Rules of Civil Procedure and did not err.

Second, assuming arguendo, that service may be perfected in accordance with state rules and without addressing whether the petitioner's manner of service conformed with New Jersey's State Court rules, the petitioner failed to comply with N.J. Ct. R. 4:4-1 which states:

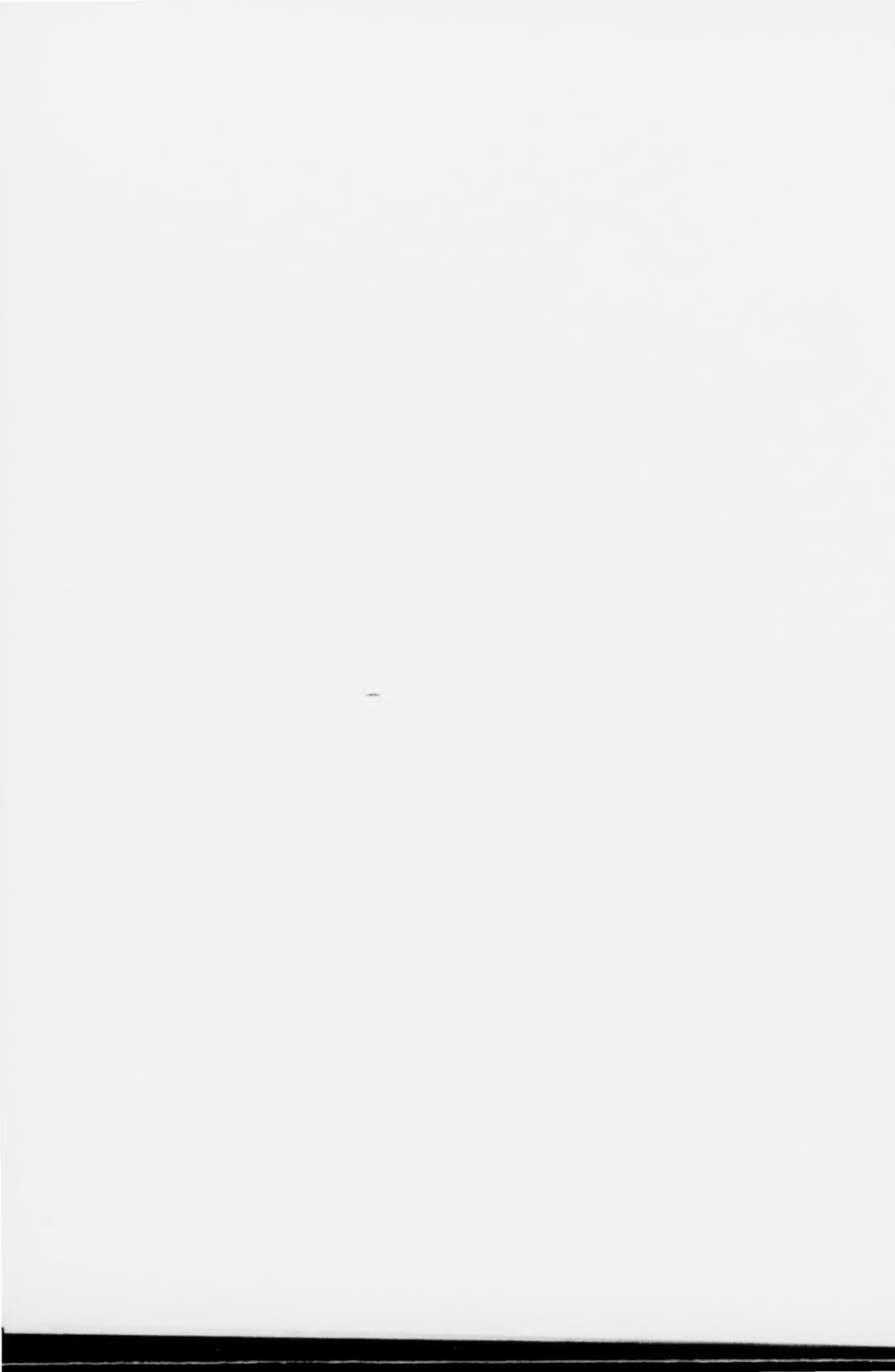




The plaintiff, his attorney or the clerk of the court may issue the summons. If a summons is not issued within 10 days after the filing of the Complaint the action may be dismissed in accordance with R. 4:37-2(a)...

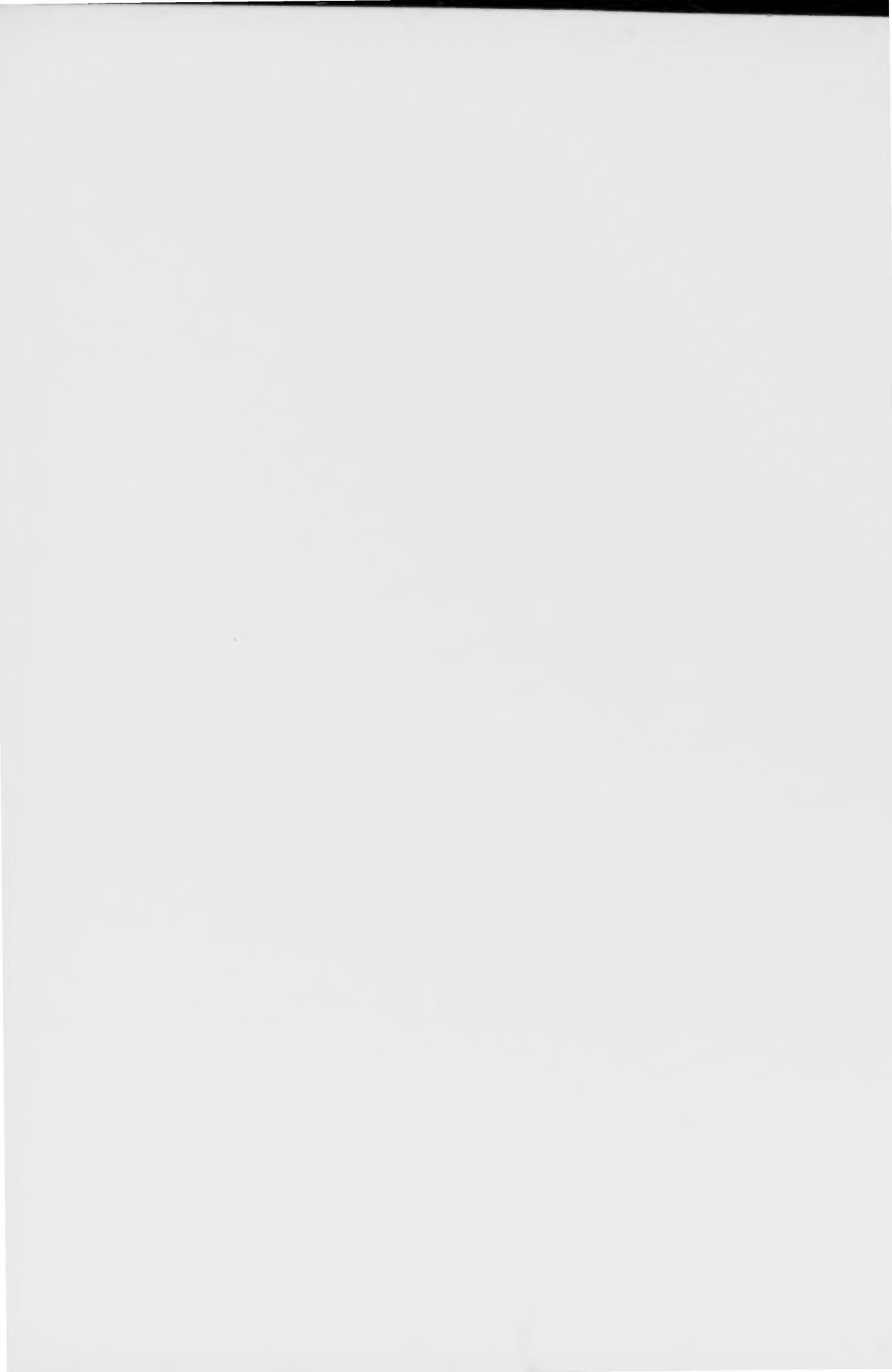
For the purpose of this rule, issuance of the Summons is interpreted to include service of process upon an adverse party. Tall Timbers Property Owners Ass'n. v. Tall Timbers, Inc., 217 N.J. Super. 119, 123, 524 A.2d 1315 (App. Div. 1987) questioned on other grounds, Cogdell v. Hospital Center at Orange, 116 N.J. 7, 560 A.2d 1169 (1989). Therefore, in the instant action since the Summons was "issued" to the defendants well over 10 days after the filing of Complaint, petitioner failed to comply with New Jersey's Court Rules.

Third, the petitioner relies on West v. Conrail, 481 U.S. 35 (1987) and Walker v. Armco Steel Corp., 446 U.S. 740 (1980) for the proposition that the statute of limitations is tolled when the Complaint is filed. Therefore, the petitioner argues, since his Com-



plaint was timely filed, his action is still viable pursuant to his interpretation of West and Walker. However, those cases are completely inapplicable to the instant action. While in those cases the Court discussed whether a suit is commenced for purposes of tolling the applicable statute of limitations upon the filing of the Complaint, without regard for the date of the service of process, West, 481 U.S. at 39, Walker, 446 U.S. at 741, 748, the petitioner failed to inform this Court that service of process in both of those cases occurred well within the 120 day time limit as established by the Federal Rules of Civil Procedure. West, 481 U.S. at 36 (service of process upon the last defendant occurred 62 days after filing the Complaint); Walker, 446 U.S. at 742 (service of process upon the last defendant occurred 104 days after filing the Complaint).

Therefore, although those cases discussed the tolling of the statute of limi-



tations by the filing of a Complaint, in both cases this Court considered matters which, unlike the present action, had been commenced in accordance with the parameters set forth in Fed. R. Civ. P. 4(j).

Finally, the petitioner asserts that service of a Summons and Complaint is complete upon mailing, and since he mailed his Summons and Complaint within the 120 day time limit, he had achieved service of process within the parameters established by Fed. R. Civ. P. 4(j).

As the District Court stated in its opinion:

Under Third Circuit law, service of process under Fed. R. Civ. P. 4(c)(2)(C)(ii), the rule which allows for service by mail, is complete when the defendant signs and returns form 18-A. Stranahan Gear Co. v. NL Industries, Inc., 800 F.2d 53, 56-57 (3d Cir. 1986); Green v. Humphrey Elevator and Truck Co. and Maintenance Co., 816 F.2d 877, 881 (3d Cir. 1987); Braxton v. United States, 817 F.2d 238, 240 note 1 (3d Cir. 1987). Therefore, in this circuit, the individual making the complaint must mail process and receive the form from defendant within



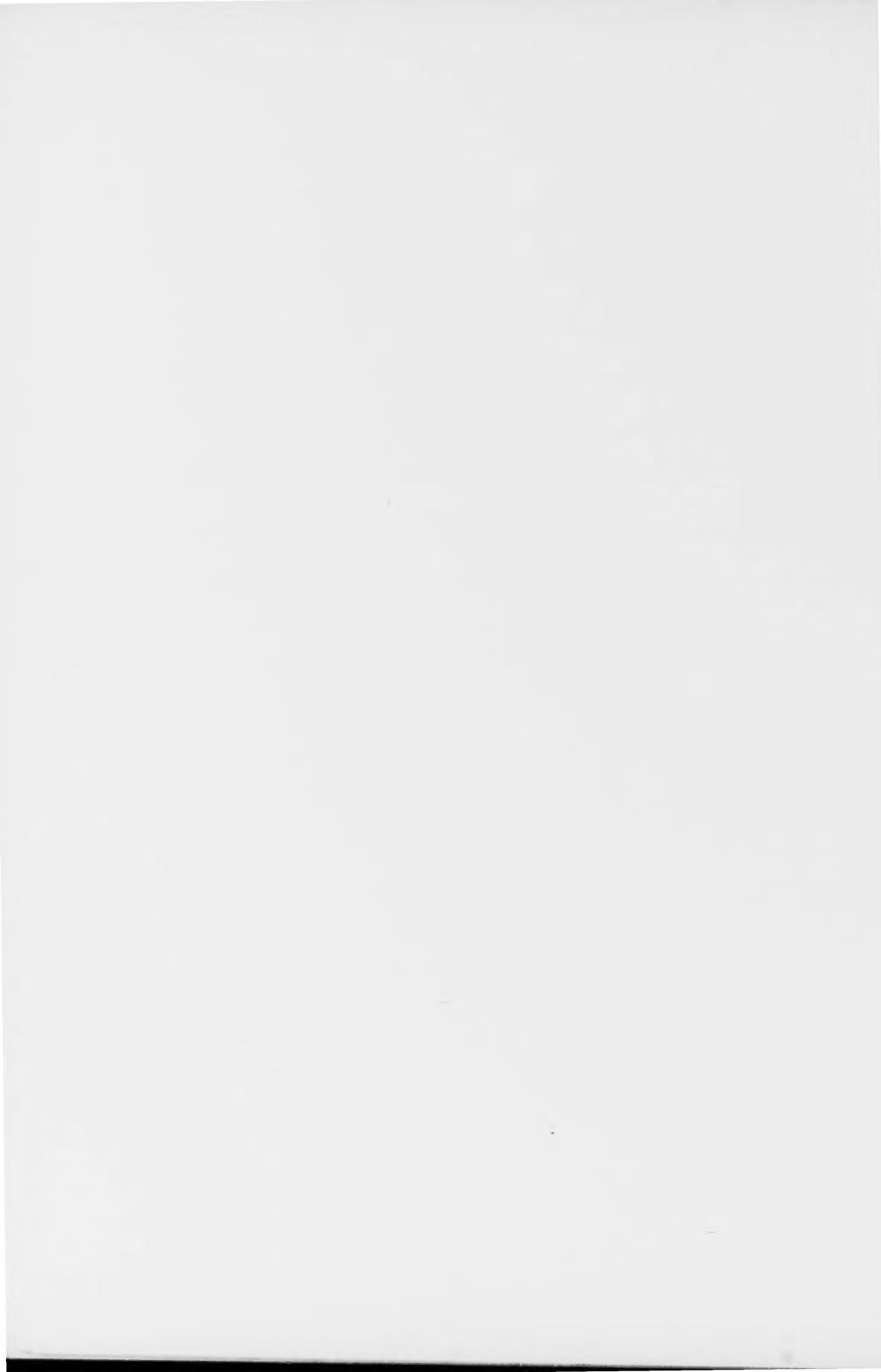
120 days of filing the Complaint.  
(Pa 68-69).

Thus, in the Third Circuit mere mailing of the Summons and Complaint does not constitute completed service.

Therefore, the present Petition for Certiorari should be denied because service of process is not achieved merely upon mailing the Summons and Complaint to the defendants and service of process was not completed within 120 days as required by the Federal Rules of Civil Procedure.

2. The Third Circuit's decision regarding of when service is made within the meaning of Fed. R. Civ. P. 4(j) does not conflict with New Jersey case law.

Petitioner claims a conflict exists between the Federal Rules of Civil Procedure and decisions of the New Jersey Supreme Court. In this argument, the petitioner relies principally on County v. Pacific Coast Borax Co., 67 N.J.L. 48, 50 A. 906 (Sup. Ct. 1902), aff'd





68 N.J.L. 273, 53 A. 386 (E. & A. 1902) to demonstrate this alleged conflict. Such reliance is plainly misplaced.

By the petitioner's own admission, Pacific Coast Borax Co. was decided long before the enactment of the present New Jersey Court Rule 4:4-4(a)(2) which now permits service by mail. Additionally, Pacific Coast Borax Co. did not stand for the proposition that service was made at the time the Summons had been delivered to the Sheriff as the petitioner has inferred. Instead, that case stated that the applicable statute of limitation was tolled on the date which the "process was issued in good faith for the purpose of being served," assuming that service was thereafter properly made. Pacific Coast Borax Co., 67 N.J.L. at 54.

Therefore, the petitioner's argument that a conflict exists between the decisions of the Third Circuit and the New Jersey Supreme Court is baseless. In fact, the New

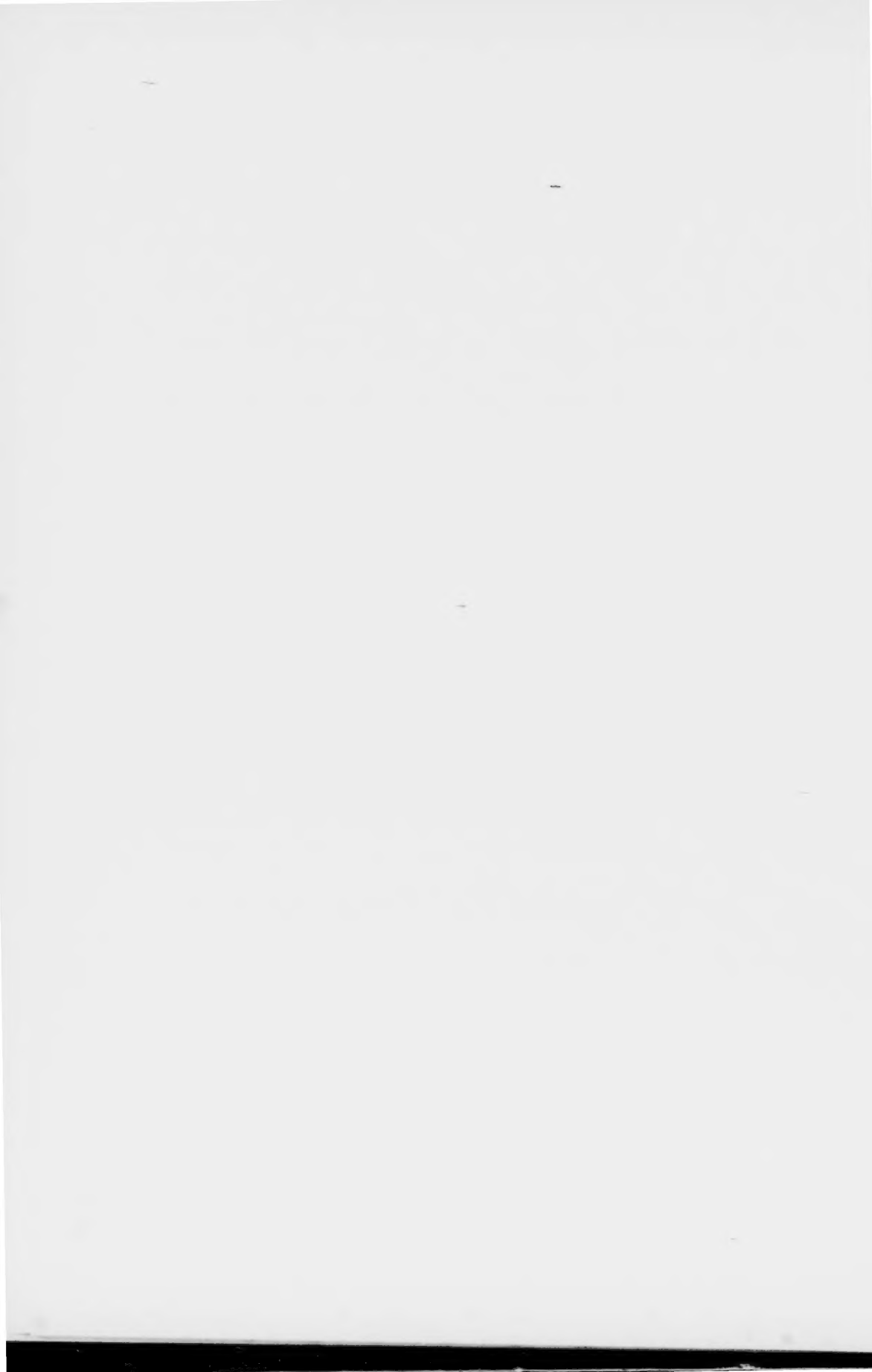


Jersey Court Rules, as promulgated by the New Jersey Supreme Court, provide that service of the Summons and Complaint must be accomplished within 10 days, N.J. Ct. R. 4:4-1, and, if attempted to be served by mail, personal service must follow any ineffective mail service after 60 days. N.J. Ct. R. 4:4-4(a)(1). Although the time frames under the New Jersey Court Rules are abbreviated, this method of service is in accordance with the spirit of the provisions of Fed. R. Civ. P. 4.

Based upon the foregoing, there is no conflict between the decisions of the Third Circuit and the New Jersey Supreme Court.

3. Service of a Summons and Complaint is not made within the meaning of Fed. R. Civ. P. 4(j) when service is attempted under Fed. R. Civ. P. 4(c)(2)(C)(ii).

For the reasons set forth in full in Point I supra, the Association urges this Court to deny the present Petition for Certio-



rari because service of a Summons and Complaint made by mail is complete upon receipt of the Summons and Complaint and return of the signed acknowledgment by the defendant. Where the acknowledgment is not returned, service is made and complete upon personal service on the defendant. Green v. Humphrey Elevation and Truck Co., 816 F. 2d 877, 881 (3rd Cir. 1987). Morse v. Elmira Country Club, 752 F.2d 35, 41 (2d Cir. 1984); Armco v. Penrod-Stauffer Bldg. Syst., 733 F.2d 1087, 1089 (4th Cir. 1984).

Although Fed. R. Civ. P. 5(b) states that "service is complete upon mailing", section (a) of that same Rule requires "...every pleading subsequent to the original complaint...shall be served upon each of the parties." Unfortunately, the petitioner seems to have misapplied the concepts set forth in Fed. R. Civ. P. 5 to the operations of Fed. R. Civ. P. 4. This confusion cannot form a basis for a Petition for Certiorari and a review by this Court.



Based upon the foregoing, the Association urges this Court to deny the present Petition for Certiorari because it did not receive the Summons and Complaint within 120 days after the Complaint had been filed.

4. The Third Circuit's decision of when service is made within the meaning of Fed. R. Civ. P. 4(j) does not conflict with decisions of the U.S. Supreme Court.

By the petitioner's own admission, prior to 1982 the service of Summons and Complaint in the Federal District Court had to be made by the U.S. Marshall. The cases cited in the petitioner's argument all predate 1982 and consider situations where the Complaint had been filed prior to the expiration of the applicable statute of limitation, but had not been served until after the statute expired. Linn & Lane Timber Co. v. United States, 236 U.S. 574, 578 (1915); Maier v. Independent Taxi Owners Ass'n, 96 F.2d 579 (D.C. Cir.





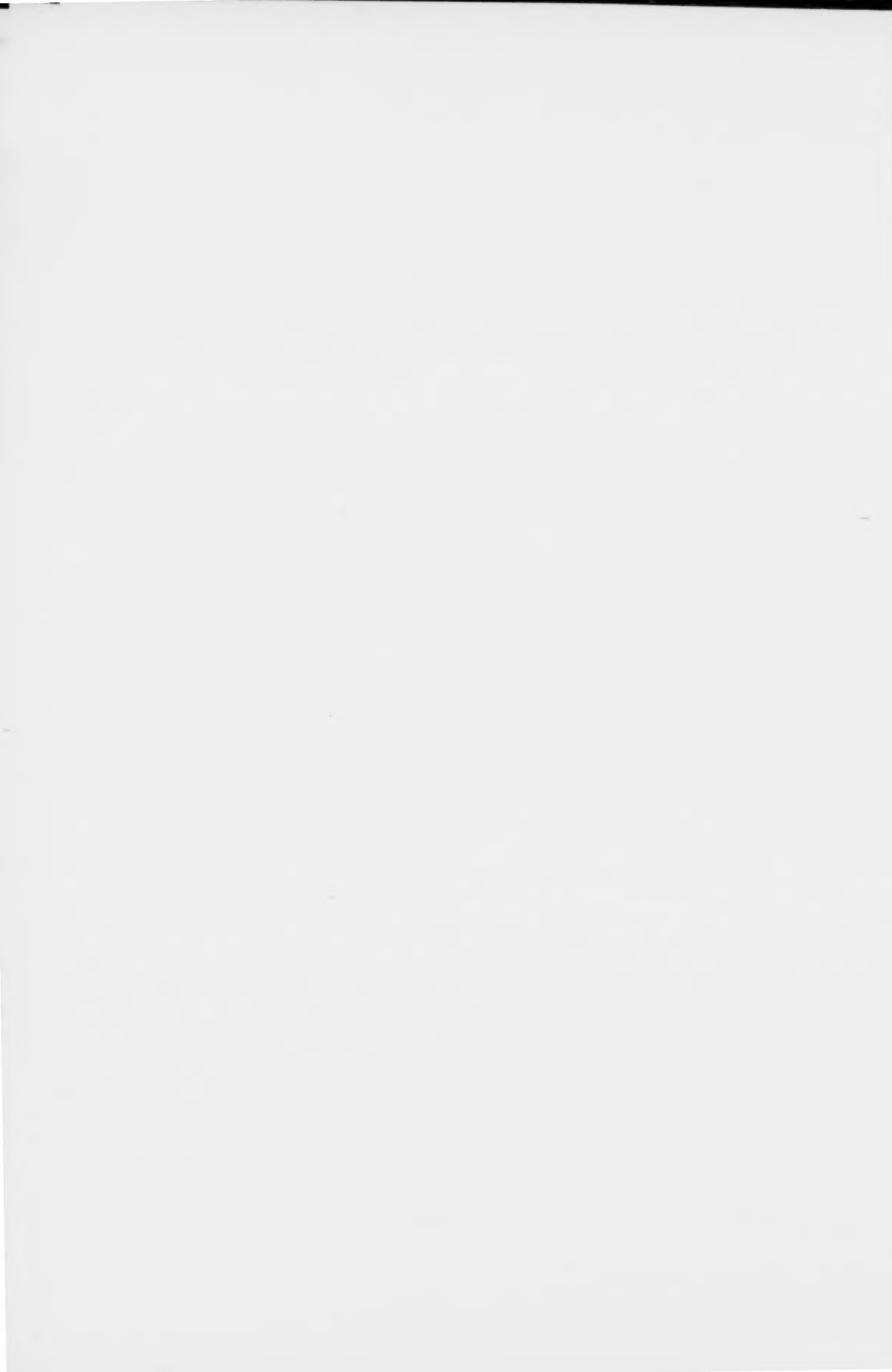
1938); Equitable Ass. Co. v. Schwartz, 42 F.2d 646 (5th Cir. 1930); United States v. Northern Finance Corp., 16 F.2d 999 (2d Cir. 1927).

These factual scenarios are completely opposite to the present situation.

The instant case involves a plaintiff/petitioner, who through his own inattention, for which he offers no excuse, failed to serve his Summons and Complaint upon the Association within the 120 day time frame allowed under Fed. R. Civ. P. 4(j). To compare delivery of a Summons and Complaint to the U.S. Marshall for service as required under the earlier Federal Rules of Civil Procedure with mailing a Summons and Complaint just prior to the expiration of the 120 day time limit under the present Federal Rules of Civil Procedure is disingenuous at best.

Based on the foregoing, the petitioner's arguments are without merit.

5. There is no split in the Circuits as to when service of a Summons and

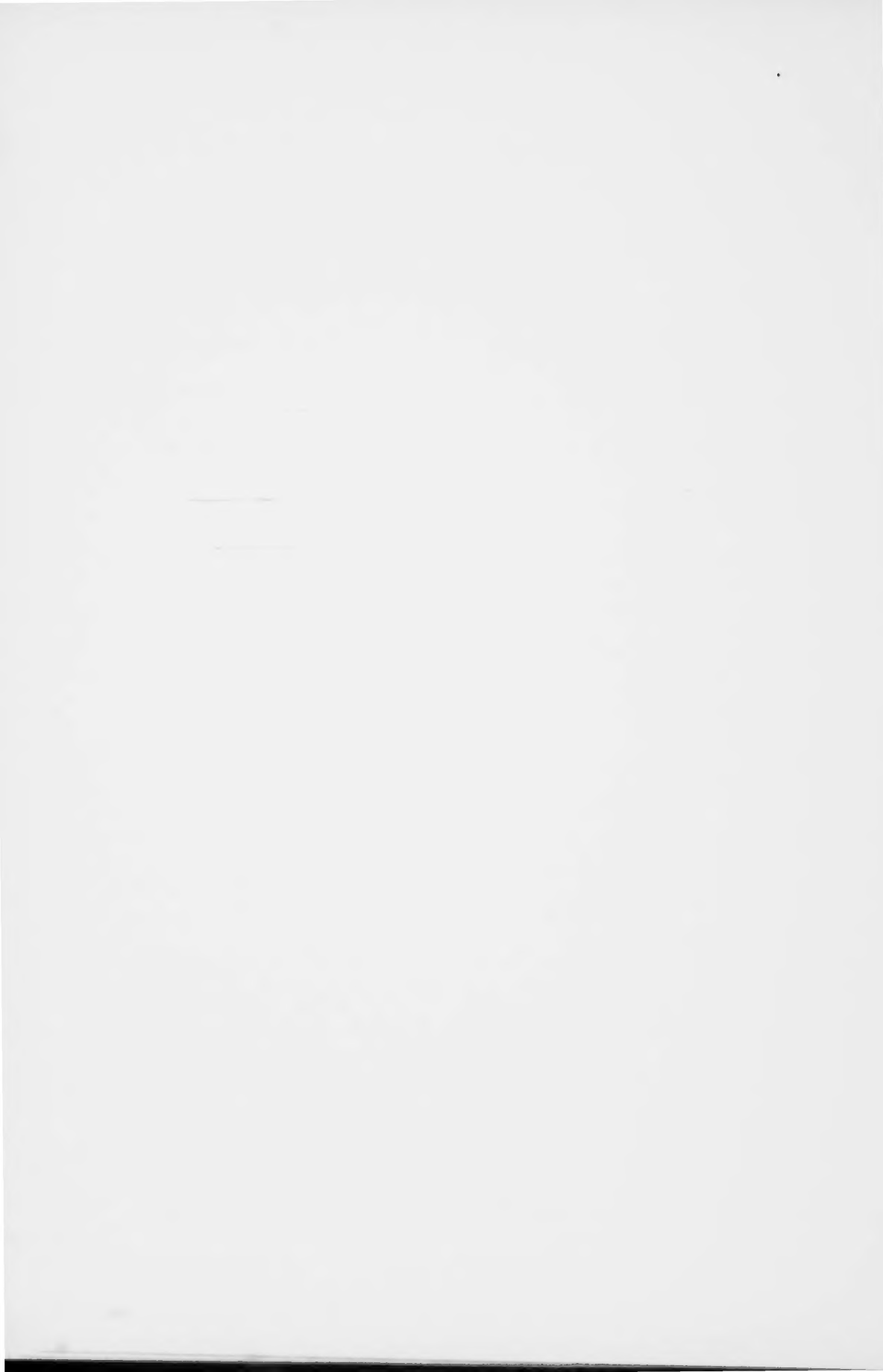


Complaint is made within the meaning of Fed. R. Civ. P. 4(j).

The petitioner incorrectly claims there is a split in the circuits regarding the issue of when service of a Summons and Complaint is made within the meaning of Fed.R.Civ.P. 4(j) based upon his misreading of the Second Circuit's opinion in Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984). The Petitioner contends that Morse holds that service is made when the Summons and Complaint is mailed. However, Morse actually states:

...Congress substituted the current system, of mail delivery followed by acknowledgment or personal service, to insure that defendant would always receive actual notice.

Under the original version of the rule [Fed. R. Civ. P. 4(c)(2)(C) prior to 1983], effective service was complete upon mailing; all defendant needed to produce in order to obtain a default judgment was the returned envelope plus another mail delivery. When Congress changed the particulars of the initial mailing and substituted personal service as a follow-up, it gave no indication



that it intended to change the prior view that mail service was effective where the recipient received the mail and accordingly received actual notice. That is our position in this case, a position consistent with the wording and legislative history of Rule 4. (emphasis added).

Id. at 41. Additionally, the defendant in the Morse case was served within the 120 day time frame of Fed. R. Civ. P. 4(j). Id. at 36. This fact alone makes the Morse case inapplicable to the present situation.

The difference of opinion between the circuits instead focuses on when service is made pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) and defendant fails to return the acknowledgment within the designated time period. Under these conditions, the question then becomes whether the mailing can stand as effective service of process by simply treating it as made in accordance with a state-law method. Combs v. Nick Garin Trucking, 825 F.2d 437, 448 (D.C. Cir. 1987). As the Combs



Court stated when considering a possible split in the circuits:

One could argue that Armco [v. Penrod-Stauffer Bldg. Syst., 733 F.2d 1087 (4th Cir. 1987)] and Morse are reconcilable by virtue of the latter case's focus on statute of limitations issues. Because, however, the timeliness of the action in Morse was grounded on the court's determination that mail service had been achieved under Rule 4, we doubt that the cases can be harmonized in this fashion. The Morse court itself described Armco as "inapposite," seemingly viewing Armco as a ruling that a plaintiff must use personal service to obtain proof of a prior mail service in the absence of a returned acknowledgment, but not as holding that the acknowledgment was a prerequisite to effective mail service. This supposed distinction, however, rests on a faulty understanding of the facts in Armco; as the Fourth Circuit noted "[n]o other service of process was attempted" aside from the unacknowledged mailing. Thus, these decisions cannot be squared; they reflect antithetical readings of [Fed.] Rule [Civ. P.] 4(c)(2)(C)(ii), and we must consider each carefully before making any choice between them. (emphasis in the original).

Combs, 825 F.2d at 445-46.

The distinction which the petitioner uses as the basis for his Petition is whether



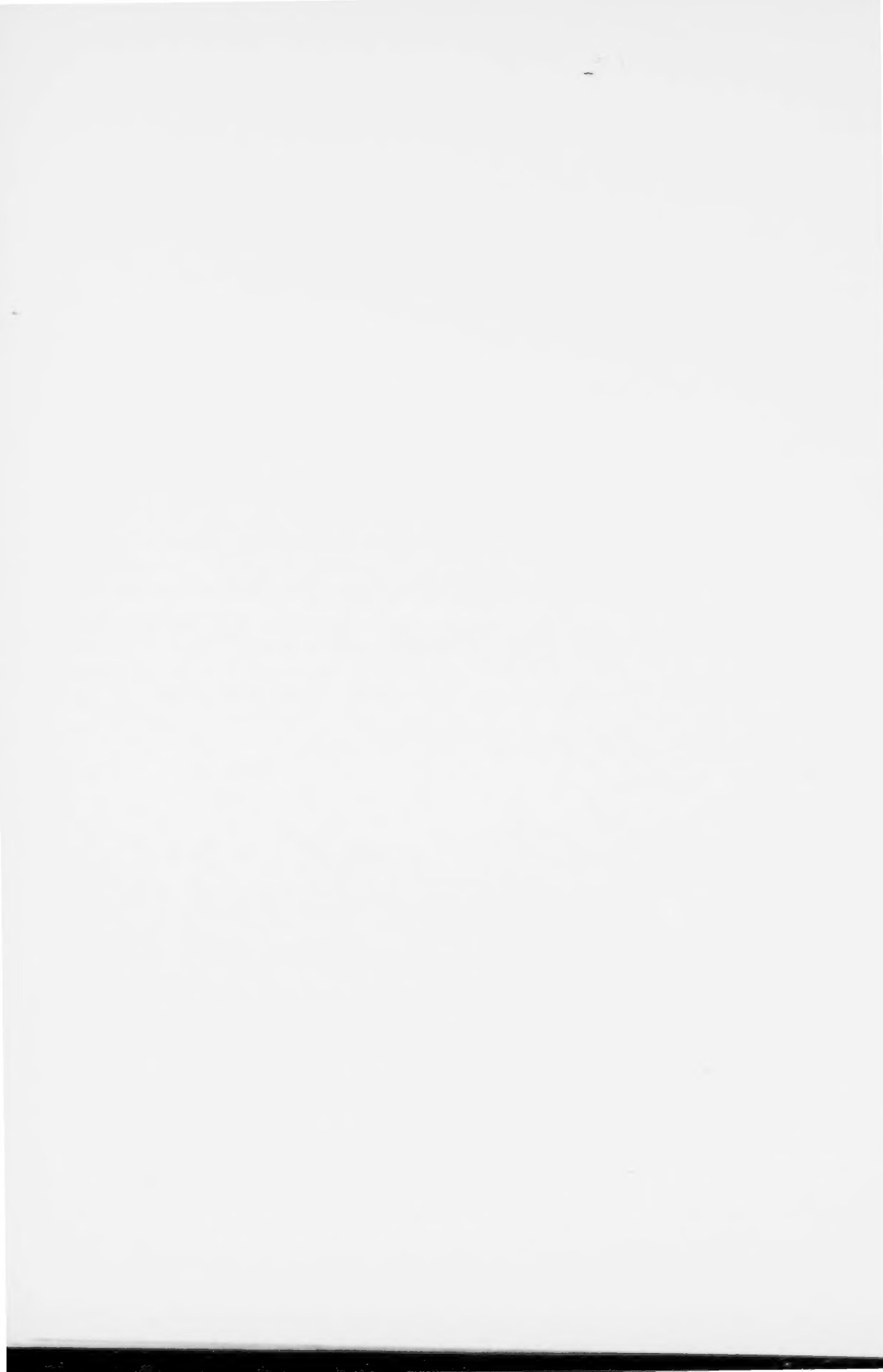


service by mail is valid if the acknowledgment of service is not returned. This distinction does not even closely resemble the scenario described in the Petition. In fact, none of the cases cited in the Petition even consider if service was made upon mailing or upon receipt.

Based on the foregoing, the Association urges the Court to deny the Petition for Certiorari because the possible split in the circuits is not applicable to the present case, especially since the Association did not receive service of process within the 120 day time limit.

6. The Third Circuit applied the correct standards in determining whether the pleadings alleged "good cause" within the meaning of Fed. R. Civ. P. 4(j).

Although the petitioner asserts that both the District Court and the Third Circuit failed to apply the correct standard in deter-



mining "good cause" under Fed. R. Civ. P. 4(j) in order to obtain relief from the 120 day time limit, he has consistently provided no basis for those Courts to find otherwise.

The "good cause" exception was enacted to protect diligent plaintiffs who made every effort to comply with Rule 4(j), but nonetheless, did not. Green v. Humphrey Elevator & Truck Co., 816 F.2d 877, 880 (3d Cir. 1087). By the petitioner's own admission, he waited 117 days before mailing the Summons and Complaint. This can hardly be considered due diligence and is not excusable neglect as provided for in Consolidated Freightways Corp. v. Larson, 827 F.2d 916, 919 (3d Cir. 1987). Throughout this litigation, the petitioner has not proffered one iota of proof that the District Court did not have good cause to dismiss his Complaint and the Third Circuit did not err in its review of the District Court.

Based on the foregoing, the Association urges this Court to deny the present



Petition for Certiorari since the plaintiff/petitioner's conduct in attempting to serve the Summons and Complaint on this defendant did not fall within the "good cause" exception of Fed.R.Civ.P. 4(j).

7. The Third Circuit applied the correct standards in determining whether "reasonable inquiry" within the meaning of Fed. R. Civ. P. 11 had been shown.

Although the petitioner asserts that the District Court and the Third Circuit applied the incorrect standard in his application for Fed. R. Civ. P. 11 sanctions against the Association, he has never stated what standard should have been applied and how this Court should have settled any dispute which may have existed. Instead, he seems to imply that because he is a pro se plaintiff, although an attorney admitted to the Bar of the State of New York, he should be afforded

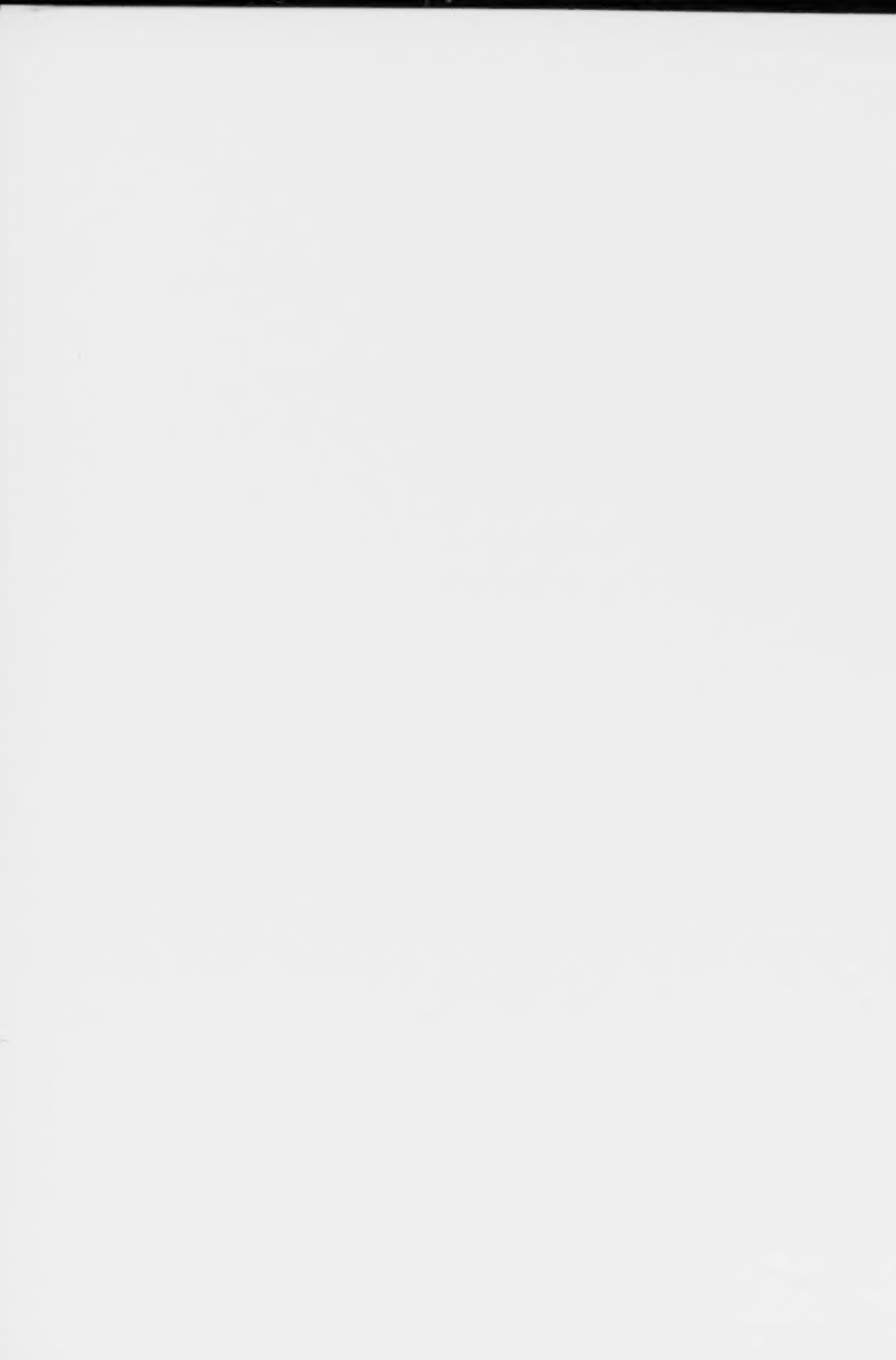


special treatment and leniency in his pleadings.

Additionally, because the petitioner implies that the Association should have accepted mail service or not filed its motion to dismiss for improper service of process, he levies blame on the Association for the pursuit of its own legal rights. This certainly cannot serve as the basis for a Petition for Certiorari by this Court.

Furthermore, throughout the entire litigation, he has never stated what is a "reasonable inquiry" despite the existence of a plethora of decisions to provide such guidance.

Therefore, based on the foregoing, the Association urges this Court to deny the petitioner's request for a Writ of Certiorari.





CONCLUSION

Based upon the foregoing, the Association respectfully request that the Petition for Writ of Certiorari be denied.

Christopher J. Carey  
Counsel of Record

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100 Mulberry Street  
Newark, N.J. 07102-4070  
(201) 622-3000

Attorneys for Respondent  
The American Association of  
University Professions



APPENDIX



UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
HONORABLE H. LEE SAROKIN  
CIVIL ACTION NO. 88-3692

PHILIP E. FOSTER,

Plaintiff,

v.

RUTGERS, THE STATE THE  
UNIVERSITY; THE RUTGERS  
COUNSEL OF THE AMERICAN  
ASSOCIATION OF UNIVERSITY  
PROFESSORS; THE PERMANENT  
PANEL ON PROCEDURES; AND  
THE AMERICAN ASSOCIATION  
OF UNIVERSITY PROFESSORS,

Joint and Several  
Defendants.

---

AFFIDAVIT OF ALESIA POPE

---

CITY OF WASHINGTON :  
SS.  
DISTRICT OF COLUMBIA:

I, ALESIA POPE, being duly sworn,  
depose and say as follows:

1. I am the receptionist employed  
by the American Association of University



Professors ("AAUP") and have first-hand knowledge of the facts recited in this affidavit.

2. I have worked as the receptionist at the AAUP for four years.

3. When the AAUP mail clerk is on vacation, I am in charge of opening all of the mail which comes to the AAUP.

4. On December 28, 1988, the AAUP mail clerk was on vacation and I therefore was charged with opening all of the mail that day.

5. On December 28, 1988 we received a 9 1/2" by 12 1/2" envelope with a return address of P. Foster, 23 East 81, NYC, NY.

6. On the back of the envelope was a green 3 1/2" by 7" form called "Domestic Return Receipt."

7. I was not asked to sign for the delivery of the envelope.

8. The envelope contained a court complaint captioned Philip E. Foster v. Rutgers, The State University; et. al.





9. A copy of the envelope and complaint is attached hereto as Exhibit A.

Further, the affiant saith not.

S/Alesia Pope  
Alesia Pope

Subscribed and Sworn to  
before me this 13th day of  
January, 1989.

S/Dolous R. Bensted  
NOTARY PUBLIC

My commission expires:

10/31/89



EXHIBIT A

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

PHILIP E. FOSTER,

Plaintiff,

-against-

88 Civ. 3692(HLS)

RUTGERS, THE STATE THE  
UNIVERSITY, et al.,

Defendants.

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NOTICE AND ACKNOWLEDGEMENT  
OF RECEIPT OF SUMMONS AND COMPLAINT

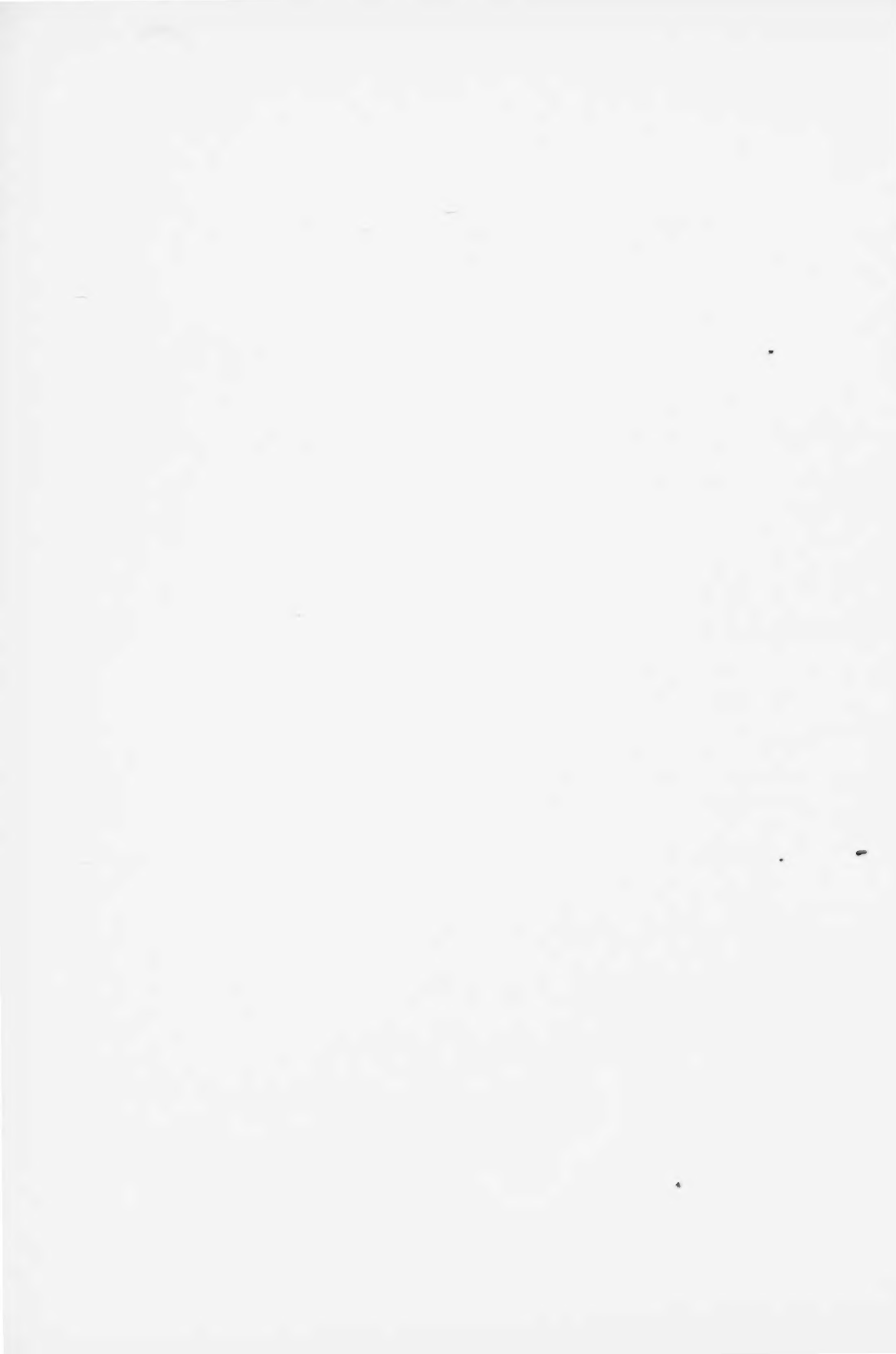
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TO: [Insert name and address of party to be  
served.]

Defendant, A.A.U.P.

The enclosed Summons and Complaint  
are served pursuant to Rule 4(c)(2)(C)(ii) of  
the Federal Rules of Civil Procedure.

You must complete the acknowledge-  
ment part of this form and return one copy of  
the completed form to sender within 35 days.



You must sign and date the acknowledgement. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a Summons and Complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 35 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.



I declare, under penalty of perjury,  
that this Notice and Acknowledgement of Re-  
ceipt of Summons and Complaint will have been  
mailed on.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS OF  
COMPLAINT

I declare, under penalty of perjury,  
that I received a copy of the Summons and  
Complaint in the above-captioned matter at  
[Insert Address] \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Relationship to entity/  
Authority to Receive  
Service of Process